Supreme Court, U.S.
FILED

02 983 DEC 23 2002

OFFICE OF THE CLERK

In the

Supreme Court of the United States

FRANK CASS,

Petitioner,

v.

PATRICIA LOVE STEPHENS, INDIVIDUALLY AND AS TRUSTEE OF THE WALTER H. STEPHENS TRUST, THE SSH TRUST, THE SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and THE HEATHER LOVE STEPHENS IRREVOCABLE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ACKELS & ACKELS, L.L.P.
Attorneys for Petitioner Frank Cass
2777 Stemmons Freeway, Suite 879
Dallas, TX 75207
(214) 267-8600

Henry J. Ackels
Lawrence E. Ackels, Jr.,
Gregory E. Ackels

110 pp

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Under *BMW v. Gore*, the due-process clause prohibits a state from imposing a grossly-excessive punishment on a tortfeasor, and punitive-damages awards that are not proportional to the actual damages awarded or not connected to a defendant's misconduct violates a party's substantive due-process rights. The Texas Court of Appeals, claiming it was following *BMW*, affirmed a remitted punitive-damages award that was more than 25 times the actual damages, and the disproportionate award indicates that the jury's decision was based on conduct by Cass during the litigation and not on pre-litigation conduct. Should the Petition be granted to determine whether additional guidelines are needed to prevent state courts from approving awards that violate the due process clause and whether an award of punitive damages must be based on misconduct that is related to the subject matter of the litigation?

2. Texas, like other states and all federal appellate courts, has a court rule prohibiting the citation and precedential value of unpublished appellate opinions, and the Texas Court of Appeals in this case issued a 19,00 word unpublished opinion announcing new principles of law and deviating from previous published precedents. Because the opinion was not published, Cass's ability to seek further review in a higher court was compromised because the Court of Appeals' opinion only applied to Cass and is not considered precedent for any future litigant Should the Petition be granted to consider whether rules prohibiting citation of appellate opinions

violate the constitutional rights of litigants like Cass by allowing courts to promulgate rules of law with selective prospectivity, acting as a prior restraint on free speech, and denying litigants their due process rights?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

A. Cass Becomes Involved With Gen. Stephens and Patricia Stephens in an Oil and Gas Venture 5

B. Cass Resigns, No New Operator is Elected, Notice is Sent That COC is the New Operator, Gen. Stephens Consents, and All Payments Are Made to COC. 5

C. In 1986, Patricia Stephens Makes Her First Complaint and Audits COC. 7

D. After the Litigation Began, Cass Threw Away Some Documents, All of Which Had Been Previously Given to Stephens, and Was Sanctioned. 7

E. In the Wake of the Alleged Discovery Abuse and Sanctions, the Jury's Verdict Included Punitive-Damages Awards of 49 and 151 times the Related Actual Damages, and After Remitter, the Judgment Included Punitive Damages More than 25 Times the Actual Damages. 8

F. The Court of Appeals, Ignoring its Own Precedent and Texas Supreme Court Decisions, Affirms and Orders That the 19,000 Word Opinion not be Published Under Texas Rule of Appellate Procedure 47. 9

REASONS FOR GRANTING THE PETITION 10

POINT I THE PETITION SHOULD BE GRANTED TO DETERMINE WHETHER ADDITIONAL GUIDELINES ARE NEEDED TO PREVENT STATE COURTS FROM APPROVING AWARDS THAT VIOLATE THE DUE PROCESS CLAUSE AND WHETHER AN AWARD OF PUNITIVE DAMAGES MUST BE BASED ON MISCONDUCT THAT IS RELATED TO THE SUBJECT MATTER OF THE LITIGATION. . . . 12

A. Given That the Texas Court Approved a Punitive-Damages Award 25 Times the Actual Damages Where Only Economic Injuries Were Present, the Petition Should be Granted to Give Additional Guidance to State Courts Regarding Federal Constitutional Standards for Punitive-Damages Awards. 12

B. The Petition Should be Granted to Address Whether a Jury May Consider Misconduct by a Defendant

Unrelated to the Subject Matter of the Plaintiff's Claims in Assessing Damages. 14

POINT II THE PETITION SHOULD BE GRANTED TO CONSIDER WHETHER RULES PROHIBITING CITATION OF APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS LIKE CASS BY ALLOWING COURTS TO PROMULGATE RULES OF LAW WITH SELECTIVE PROSPECTIVITY, ACTING AS A PRIOR RESTRAINT ON FREE SPEECH, AND DENYING LITIGANTS THEIR DUE PROCESS RIGHTS. 15

A. Because Most State and Federal Appellate Courts Have Rules Forbidding the Citation of Unpublished Decisions, the Issue is of Great Significance. 16

B. Texas Rule of Appellate Procedure 47 Prohibits the Citation of Unpublished Opinions Like the 19,000 Word Texas Decision Even Though the Decision Conflicts With Other Texas Precedent and Involves Issues of First Impression. 18

C. As Unpublished Opinions Become More Readily Available, Courts and Commentators Have Recently Considered Whether Non-Publication Rules Violate the Constitution. 19

D. The Petition Should be Granted to Address Whether No-Citation Rules Violate This Court's Decision in *James B. Beam Distilling Co. v. Georgia* Prohibiting Selective Prospectivity Because an Unpublished, Uncitable Decision Allows a Court to

Create a New Rule of Law That is Only Applicable to a Single Case and Litigant 21

E. The Petition Should be Granted Because No-Citation Rules Violate Litigants' First Amendment and Due Process Rights. 24

1. The Court Should Address Whether Non-Publication Rules Constitute Prohibited Content-Based Prior Restraints on Speech 24

2. The Court Should Consider Whether No-Citation Rules, by Insulating Unpublished Decisions From Review and Denying Litigants Access to Relevant Case Law, Violate Litigants' Due-Process Rights. 25

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES

Anastasoff v. United States,
223 F.3d 898 (8th Cir. 2000),
vacated as moot, 235 F.2d 1054
(8th Cir. 2000) (en banc) 19, 20, 23

BMW of North America v. Gore,
517 U.S. 559 (1996) 10, 12, 13, 14

Griffith v. Kentucky,
479 U.S. 314 (1987) 22

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001) 20

James B. Beam v. Georgia,
501 U.S. 529 (1991) 16, 21, 22

Legal Services Corp. v. Velazquez,
531 U.S. 533 (2001) 25

Near v. Minnesota,
283 U.S. 697 (1931) 24

New York Times Co. v. United States,
403 U.S. 713 (1971) 24

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 13

Staub v. Baxley,
355 U.S. 313 (1958) 24

Williams v. Dallas Area Rapid Transit,
256 F.3d 260 (5th Cir. 2001),
cert. denied, 122 S.Ct. 618 (2001) 20, 22

DOCKETED CASES

State Farm Mutual Automobile Ins. Co. v. Campbell,
No. 01-1289 ..... 11, 14, 16

TEXAS CASES

Abraxas Petroleum Corp. v. Hornburg,
20 S.W.3d 741, 750-51
(Tex. App. – El Paso 2000, no writ) 9, 26

Computer Assoc. Int'l v. Altai, Inc.,
918 S.W.2d 453, 456 (Tex. 1994) 10

Purvis Oil Corp. v. Hillin,
890 S.W.2d 931, 937
(Tex. App. – El Paso 1994, no writ) 9, 23, 25

Southwestern Bell Telephone Co. v. Delanney,
809 S.W.2d 493 (Tex. 1991) 10

Wagner & Brown, Ltd. v. Horwood,
58 S.W.3d 732 (Tex. 2001) 10

TEXAS STATUTES AND RULES

Tex. Gov't Code § 22.001 ..... 11, 26, 27

Texas Rule of Appellate Procedure 47.3 26

Texas Rule of Appellate Procedure 47.4 ..... 2, 18, 20

Texas Rule of Appellate Procedure 47.7 ..... 2, 11, 18, 25, 27

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

1st Cir. R. 26(b)(2)(f) 17

2d Cir. R 0.23 17

3rd Cir. Int. Op. Proc. 5.8 17

4th Cir. R. 36(c) 17

5th Cir. R. 47.5.4 17

6th Cir. R. 28(g) 17

7th Cir. R 53(b)(2)(iv) 17

8th Cir. R 28A(i) 17

9th Cir. R. 36-3(a) 17

10th Cir. R. 36.3.5 17

11th Cir. R. 36-2, 36-3 17

D.C. Cir. R. 28(h) 17

Fed. Cir. R. 47.6(b) 17

United States Constitution,
First Amendment 2, 11, 16, 24, 26

United States Constitution,
Fourteenth Amendment, Section One 1, 3, 12

MISCELLANEOUS

Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423 (2002) 21

David M. Gunn, *Unpublished Opinions Shall Not be Cited As Authority: The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L. J. 115 (1992) 18

Judicial Business of the United States Courts: 1999 Annual Report of the Director (2000) 17

Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002) 21

Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH J. L. REF. 119 (1994) 16

Deborah Jones Merritt and James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 72 (2001) 17, 21

William J. Miller, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181 (2001) 21

Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROC. 251, 261-75 (2001) 17

Johanna S. Schiavoni, *Who's Afraid of Precedent? The Debate over the Precedential Value of Unpublished Opinions*, 49 U.C.L.A. L. Rev. 1859 (2002) 21

Carl Tobias, *Anastasoff, Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J. L. & PUB. POL'Y 1171 (2002) 21

OPINIONS BELOW

The decision of the Texas Supreme Court denying Cass's Petition for Review is unreported. (App. A67.) The decision of the Texas Supreme Court denying Cass's Motion for Rehearing on his Petition for Review is also unreported. (App. A68.) The opinion of the Court of Appeals of Texas, El Paso is unpublished but may be found at 2001 WL 28092. (App. A1.) The decision of the Court of Appeals of Texas, El Paso, denying Cass's Motion for Rehearing is also unreported. (App. A69.)

JURISDICTION

The Texas Supreme Court entered a final decision in this case on September 26, 2002 when it denied Cass's Request for Rehearing on his Petition for Review. (App. A67.) This Court has jurisdiction under 28 U.S.C. § 1257(a) because (1) the judgment awarding punitive damages that are more than 25 times the actual damages awarded violated Cass's substantive due process rights under the Fourteenth Amendment of the United States Constitution, and (2) the validity of Texas Rule of Appellate Procedure 47 is drawn into question on the grounds that it is repugnant to the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texas Rule of Appellate Procedure 47.4

> Standards for Publication. An opinion should be published only if it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
(b) involves a legal issue of continuing public interest;
(c) criticizes existing law; or
(d) resolves an apparent conflict of authority.

(Effective September 1, 1997.)

Texas Rule of Appellate Procedure 47.7

Unpublished Opinions. Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

(Effective September 1, 1997.)

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Cass Becomes Involved With Gen. Stephens and Patricia Stephens in an Oil and Gas Venture.

Cass became business partners with General Walter Stephens ("Gen. Stephens"), Patricia Stephens's deceased husband, in the 1970's, and drilled and operated roughly 70 wells. (App. A2.)[1] In 1977, Cass and Gen. Stephens terminated their business relationship, and in 1980, they reached an agreement on the value of all oil and gas equipment in which they held a joint interest. (App. A2-3.) In 1978, Cass, individually, became operator of the wells. (App. A3.) Gen. Stephens, who was one of the previous operators of these wells, never objected or failed to pay a single charge in the bills Cass sent. (App. A37; V19, p. 83; V20, p. 53.)

B. Cass Resigns, No New Operator is Elected, Notice is Sent That COC is the New Operator, Gen. Stephens Consents, and All Payments Are Made to COC.

In 1979, Cass became discouraged that the working interest owners failed to pay their Joint Interest Billings ("JIBs") on time. (App. A4.) As a result, Cass sent a letter to all working interest owners, including Stephens, that he was resigning as operator under the provisions of the Joint Operating

---

[1]Reporter's Record citations include the Arabic numeral volume number and page number, e.g. "V5, p. 24." Clerk's Record citations include the letters "CR" followed by the page number. Citation to the Appendix will be by "App." followed by the page number. Citation to trial exhibits will be by "PX" or "DX" followed by the exhibit number.

Agreements ("JOAs") that controlled his duties as operator. (App. A4.)

Despite the JOA provisions that upon his resignation, the working interest owners *shall* elect a new operator, none was elected. (App. A22-24; V10, p. 55; V20, p. 6.) After three years where no operator was elected, Cass incorporated Cass Oil Company, Inc. ("COC"). (App. A21.) As President of COC, Cass then sent a letter on company letterhead to all working interest owners, including Stephens, advising them that COC, not Cass personally, was now the operator. (App. A21; V20, p. 8-9.) Gen. Stephens verbally consented to the change of operator, and none of the working interest owners ever objected. (App. A22; V10, p. 63; V16, p. 104; V20, p. 14, 16, 104.) Patricia Stephens and another owner testified that they always considered Cass, and not COC, to be the operator of the wells, but no other working interest owner ever testified to this. (App. A21.) Under the JOAs, it takes a majority interest to elect or refuse to consent to a new operator. It is undisputed that Stephens and the other testifying owner did not own a majority in interest in any well. (DX 26.)

After COC took over, all working interest owners made their checks for operation expenses payable to COC. (App. A22.) All money received for operation expenses after COC took over operations went into COC's corporate account. (V14, p. 160; V20, p. 18.) Patricia Stephens offered no evidence that Cass personally received any of these funds or that funds were used in any way other than to pay vendors who supplied services to the wells. (V10, p. 110; V11, p. 143-44.) The Texas Railroad Commission recognized COC as the operator from October 1982 forward. (App. 22.)

C. In 1986, Patricia Stephens Makes Her First Complaint and Audits COC.

After Gen. Stephens's death, Patricia Stephens, became the owner of his interest in the wells at issue. For two years, Stephens continued to pay all bills to COC without complaint. In March 1986, Patricia Stephens called Cass to complain about operations. (App. A5.) She decided to audit COC, but no one else joined in this audit. (App. A5-6; V15, p. 102.) Initially, the audit covered 1984 through 1986, consistent with the JOA two-year internal limitations period. (App. A5.) After the audit, Stephens decided to sue Cass, COC, and Frank's sons, based on the auditor's allegations that COC withheld revenue from the working interest owners and overcharged the joint account. (App. A5-6.) After the audit, COC and its employees allowed almost $200,000 in credits to the joint account. (DX-87; V16, p. 134-37; V17, p. 63-4.) This initial audit was ultimately abandoned by Stephens after eight years of litigation. (V22, p. 46, 56.)

D. After the Litigation Began, Cass Threw Away Some Documents, All of Which Had Been Previously Given to Stephens, and Was Sanctioned.

The trial court awarded $978,492.10 in sanctions against Cass. (App. A63.) The award was based on a finding that Cass committed discovery abuse by throwing away relevant documents after the filing of the lawsuit. (App. A63.) The evidence showed that any documents Cass threw away were documents Stephens either already had or that Gen. Stephens had agreed with Cass, in writing, that their joint copy kept in storage could be destroyed. (App. A65; V14, p. 178; V17, p. 134; Vol 19, p. 113-119; V20, p. 103-104; DX-72.)

E. In the Wake of the Alleged Discovery Abuse and Sanctions, the Jury's Verdict Included Punitive-Damages Awards of 49 and 151 times the Related Actual Damages, and After Remittiter, the Judgment Included Punitive Damages More than 25 Times the Actual Damages.

The discovery abuse and sanction played a large role in the ultimate jury verdict and in the Court of Appeals' affirmance, given that the facts did not support the conclusion that Cass's conduct was egregious. At trial, Stephens testified that: 1) Gen. Stephens sought clarifications about the bills from time to time from Cass; 2) anytime Gen. Stephens asked Cass for documents he got them; 3) anytime Stephens asked Cass for documents prior to the lawsuit she got them; 4) she was perfectly capable of calling Cass to discuss charges as she had heard her husband do, but chose not to; and 5) neither she nor Gen. Stephens ever once called for an audit or made an exception to a bill they paid prior to 1986 (V16, p. 92, 109-13.) Nevertheless, the jury found that Stephens could not have discovered the facts giving rise to her causes of action until the 1986 audit.

The jury awarded Stephens contractual damages in the amount of $586,162.17, fraud damages in the amount of $101,300.92, and conversion damages in the amount of $98,780.82, including damages going back to 1978, far beyond either the internal limitations period in the JOAs or the otherwise applicable statutory limitations period. (App. A10.) Then, after deliberating only 20 minutes, the jury went on to award $5,000,000 in exemplary damages against Cass on the fraud claim (49 times the actual fraud damages) and $15,000,000 in exemplary damages against Cass on the conversion claim (151 times the actual conversion damages). (App. A11.) The trial court rendered a Final Judgment on the

verdict in the amount of $23,280,398.38 against Cass personally, but remitted the exemplary damages, at Stephens' request, to $2.5 million for fraud and $2.5 million for conversion, a 25-to-1 ratio. (App. A11, A57.)

F. The Court of Appeals, Ignoring its Own Precedent and Texas Supreme Court Decisions, Affirms and Orders That the 19,000 Word Opinion not be Published Under Texas Rule of Appellate Procedure 47.

The Eighth Texas Court of Appeals at El Paso affirmed the trial court's judgment in its entirety. (App. A1.) Pursuant to Texas Rule of Appellate Procedure 47, the Court of Appeals refused to publish its 19,000 word 63-page slip opinion. (App. A1.) In affirming the trial court's judgment, the El Paso Court ignored its own published precedents and relevant Texas Supreme Court decisions but, by not publishing the decision, claimed it was not making any new law. For example, the court addressed whether COC replaced Cass as operator. In a published opinion in a case that was pending at the same time as this case, the same judges of the El Paso court held that as a matter of law, where owners assented to and accepted the benefits of a new operator's performance, they waived the JOA selection requirements. *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 750-51 (Tex. App. – El Paso 2000, no writ); *see also Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 937 (Tex. App. – El Paso 1994, no writ). That is precisely the factual scenario in this case – it is undisputed that none of the 65 working interest owners objected at the time they were notified of the change, and they all accepted the benefits of COC's performance. But in its unpublished decision, the Court of Appeals allowed the jury to find no waiver and never even cited the two cases that should have controlled the result. The El

Paso court also ignored Texas Supreme Court decisions, including *Computer Assoc. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994), *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732 (Tex. 2001), and *Southwestern Bell Telephone Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991) dealing with the statute of limitations and the availability of tort damages in connection with a contract.

Even though the El Paso court now has two decisions on the exact same issue with completely different results, and has ignored at least three on-point Texas Supreme Court precedents, the decision in this case was not published and therefore could not be cited in Texas courts. The Texas Supreme Court then denied Cass's Petition for Review and his motion for rehearing on the Petition for Review. (App. A67-68.)

REASONS FOR GRANTING THE PETITION

1. The Petition should be granted to address lingering questions raised by this Court's decision in *BMW of North America v. Gore*, 517 U.S. 559 (1996). In this case, the Texas Court of Appeals purported to apply the guideposts established in *BMW* in giving its blessing to a punitive-damages award 25 times the actual damages. While the Court in *BMW* shied away from establishing any specific measurement for what ratio between actual and punitive damages would be acceptable, continuing state-court confusion regarding the implementation of the *BMW* standards, exemplified by this case, demonstrate the importance of granting the Petition to address that issue directly. In addition, given the absence of evidence showing malice or intent to defraud on the part of Cass, it appears that the jury's punitive-damages award was influenced by sanctions imposed on Cass during the trial for litigation-related conduct.

In *State Farm v. Campbell*, No. 01-1289, the Court is currently considering a similar issue of what conduct may be factored in when making a punitive-damages award. The Petition should be granted in this case to address the similar issue raised by the jury's award.

2. The Court should also grant the Petition to address a the significant question of whether state and federal procedural rules prohibiting the citation of unpublished opinions are constitutional. The Texas court in this case issued a 19,000 word opinion addressing multiple issues, including issues of first impression in Texas, but ordered that the opinion not be published. The Texas Supreme Court's jurisdiction is effectively limited to cases involving, *inter alia*, conflicts with other Texas decisions and errors of "importance to the jurisprudence of the state." Tex. Gov't Code § 22.001. Here, the Texas Supreme Court refused to review an unpublished decision that, under Texas Rule of Appellate Procedure 47.7, could never by cited by any litigant in any Texas court. Given that the court of appeals' decision was clearly in conflict with other Texas decisions and involved a number of important issues, it is likely that, if the opinion had been published, review would have been granted. Cass does not challenge a court's authority regarding whether or not to publish a decision. Instead, the Petition presents the question of whether rules like Texas Rule of Appellate Procedure 47.7 precluding citation of unpublished opinions as precedent violate parties' constitutional rights. Unpublished opinions with no precedential value diminish judicial accountability, make useful precedent off limits to parties and their attorneys, and invite judges to use the system to insulate decisions from review by a higher court. The Petition should also be granted to consider whether these rules impermissibly allow courts to engage in

selective prospectivity and violate litigants' due process and First Amendment rights.

POINT I THE PETITION SHOULD BE GRANTED TO DETERMINE WHETHER ADDITIONAL GUIDELINES ARE NEEDED TO PREVENT STATE COURTS FROM APPROVING AWARDS THAT VIOLATE THE DUE PROCESS CLAUSE AND WHETHER AN AWARD OF PUNITIVE DAMAGES MUST BE BASED ON MISCONDUCT THAT IS RELATED TO THE SUBJECT MATTER OF THE LITIGATION.

The Court should grant the Petition to address continuing questions arising from this Court's decision in *BMW v. Gore*. The Texas court incorrectly approved a punitive-damages award against Cass that was 25 times the actual damages, particularly in the absence of any personal injuries. The Petition should be granted to give further guidance to the state courts regarding the constitutional standards for imposing punitive damages awards. In addition, the Court should grant the Petition to consider what conduct a jury may rely on in making a punitive-damages award.

A. Given That the Texas Court Approved a Punitive-Damages Award 25 Times the Actual Damages Where Only Economic Injuries Were Present, the Petition Should be Granted to Give Additional Guidance to State Courts Regarding Federal Constitutional Standards for Punitive-Damages Awards.

The Texas Court of Appeals' decision in this case highlights the importance of this Court revisiting its decision in *BMW v. Gore* to provide additional guidance to state courts regarding

constitutional standards for punitive-damages awards. In *BMW v. Gore*, this Court held that a grossly excessive punitive damages award violates a litigant's Due Process rights guaranteed by the Fourteenth Amendment. *BMW*, 517 U.S. at 585-586. In *BMW*, for the first time, this Court stated that even where a punitive-damages award is not found to be excessive under state law, it may still violate a party's substantive due process right to be protected from "grossly excessive" punitive damages awards. See *BMW*, 517 U.S. at 568. In that decision, the Court reversed a judgment of $2,000,000 in punitive damages where the actual damages had been only $4,000. *BMW*, 517 U.S. at 586. The Court determined that this award of punitive damages 500 times greater than the actual damages was grossly excessive and transcended the constitutional limit. *BMW*, 517 U.S. at 585-586. The Court also referenced *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), where the Court previously indicated that a punitive damages award that was more than four times the amount of actual damages might be close to the constitutional limit. In *BMW*, however, the Court did not set any clear guidelines for when the ratio between actual and punitive damages becomes constitutionally unacceptable.

Such guidance is needed to correct the Texas court's decision in this case and prevent future courts from mistakenly approving punitive-damages awards that, in reality, violate a litigant's due process rights.[2] The Court should consider under what circumstances, if ever, a double or triple digit ratio of

---

[2] Ms. Stephens herself apparently recognized the excessiveness of this award by filing a voluntary Written Remittitur reducing the punitive damages from $20,000,000 to $5,000,000. (App. A11.) This reduced the punitive/actual ratios from a high of 150:1 to the current 25:1.

punitive to actual damages is permissible under the Constitution. In addition, the Court should address whether a high ratio of damages is permissible where, as here, only economic injuries are alleged pursuant to a contract.

In the alternative, Cass asks this Court to grant the Petition and consider his claims in light of this Court's upcoming ruling in *State Farm Mutual Automobile Ins. Co. v. Campbell*, No. 01-1289. In *Campbell*, where this Court recently granted a writ of certiorari, the Court will review a Utah Supreme Court decision reinstating an award of $145,000,000 in punitive damages where only $2,600,000 in actual damages were awarded.

B. The Petition Should be Granted to Address Whether a Jury May Consider Misconduct by a Defendant Unrelated to the Subject Matter of the Plaintiff's Claims in Assessing Damages.

The Petition should also be granted to address what misconduct a jury may consider in making its award of punitive damages under *BMW v. Gore*. The circumstances of this case raise serious questions about the jury's punitive-damages award. The jury took only 20 minutes to return its enormous verdict, a clear indication that it was reached as a result of passion and prejudice. The record is also bereft of clear evidence of any intent to defraud or of malicious conversion. Cass also testified that he had a negative net worth after the award of compensatory damages and that he had never before or since been accused of wrong doing as an operator, despite operating over 500 wells during this time period. (Vol. 27, p. 51). The jury either disregarded relevant evidence or the award was the result of passion or prejudice.

In reality, it appears that the jury was heavily influenced by the sanctions imposed by the trial court against Cass for alleged misconduct during the litigation. During the trial, the court awarded $978,492.10 in sanctions against Cass. (App. A11.) This sanctions award was based on a finding that Cass committed discovery abuse by throwing away relevant documents after the filing of the lawsuit. (App. A11.) It is undisputed that the jury was made aware of this alleged misconduct, and it is a compelling argument that these facts influenced the jury's decision to impose punitive damage, especially given the dearth of evidence of malice or intent to defraud. In *State Farm Mutual Automobile Ins. Co. v. Campbel.*, No. 01-1289, this Court has also been asked to consider what misconduct may be considered by the jury in making a punitive-damages award. The Court should also grant the Petition in this case to consider whether a jury may take into account litigation-related misconduct in assessing punitive damages without running afoul of the constitutional due-process guaranty.

POINT II THE PETITION SHOULD BE GRANTED TO CONSIDER WHETHER RULES PROHIBITING CITATION OF APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS LIKE CASS BY ALLOWING COURTS TO PROMULGATE RULES OF LAW WITH SELECTIVE PROSPECTIVITY, ACTING AS A PRIOR RESTRAINT ON FREE SPEECH, AND DENYING LITIGANTS THEIR DUE PROCESS RIGHTS.

Most of the states and nearly all the federal appellate courts have rules regarding the precedential effect of unpublished decisions. As the internet and computerized research services make more officially-unpublished decisions available, courts

and commentators have begun to address the constitutional implications of rules that prohibit litigants from citing or even talking about thousands of appellate decisions. By using publication and no-citation rules, courts have been granted the power to determine whether their decisions in particular cases will have any precedential value, which is inconsistent with this Court's decision in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), prohibiting selective prospectivity. The no-citation rules also infringe on litigants' First Amendment free rights and due process rights. The Texas Court of Appeals' 19,000 word unpublished decision in this case is a prime example of the dangers and difficulties generated by rules that prohibit the citation of unpublished opinions, and the Petition should be granted to consider these issues.

A. Because Most State and Federal Appellate Courts Have Rules Forbidding the Citation of Unpublished Decisions, the Issue is of Great Significance.

Court rules prohibiting the citation of unpublished opinions are in widespread use in both the state and federal court systems. In 1973, the Advisory Council for Appellate Justice recommended that unpublished opinions not be cited as precedent, giving three reasons for the recommendation: 1) to prevent attorneys with special knowledge about the contents of unpublished opinions from gaining an advantage, 2) to promote judicial economy by reducing the number of opinions courts and counsel needed to examine, and 3) to save court time because judges would not have to be so careful in crafting unpublished decisions.[3] Both state and federal appellate courts

---

[3]Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment,* 28 U. Mich J. L. Ref. 119, 124-25, nn. 33-36 (1994).

have since promulgated rules prohibiting citation of unpublished opinions as precedent.

Only five states allow litigants to cite unpublished opinions as persuasive authority.[4] Thirty-two states, including Texas, prohibit citation of unpublished appellate opinions.[5] In the federal system, nearly four out of five decisions of the United States Courts of Appeals are unpublished.[6] In six federal circuits, unpublished opinions may only be cited in the same or related cases for limited purposes.[7] In six other circuits, unpublished opinions may be cited but are not considered binding precedent.[8] Because this practice is so widespread, it presents an issue of great national significance.

---

[4]*See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Proc. 251, 261-75 (2001).

[5]*See* Serfass & Cranford, *supra* at 258-75.

[6]Deborah Jones Merritt and James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 72 (2001), *citing* Judicial Business of the United States Courts: 1999 Annual Report of the Director at 49 tbl. S-3 (2000).

[7]*See* D.C. Cir. R. 28(h); 1st Cir. R. 26(b)(2)(f); 2d Cir. R 0.23; 7th Cir. R 53(b)(2)(iv); 9th Cir. R. 36-3(a); Fed. Cir. R. 47.6(b).

[8]*See* 4th Cir. R. 36(c); 5th Cir. R. 47.5.4; 6th Cir. R. 28(g); 8th Cir. R 28A(i); 10th Cir. R. 36.3.5; 11th Cir. R. 36-2, 36-3; *see also* 3rd Cir. Int. Op. Proc. 5.8 (court will not cite unpublished opinions).

B. Texas Rule of Appellate Procedure 47 Prohibits the Citation of Unpublished Opinions Like the 19,000 Word Texas Decision Even Though the Decision Conflicts With Other Texas Precedent and Involves Issues of First Impression.

The Texas Court of Appeals ordered that its opinion affirming the judgment against Cass not be published under Texas Rule of Appellate Procedure 47. In Texas, unpublished opinions have no authoritative value, and parties may not cite them as authority in any way. Tex. R. App. P. 47.7. While Texas has long had a rule providing that opinions "that present no question or application of any rule of law of interest or importance" should not be published, the rule prohibiting citation of unpublished opinions, was only added to the Texas rules in 1982.[9] Texas Rule of Appellate Procedure 47.4 provides guidelines for when an opinion should be or should not be published. Under this rule, a Texas appellate court should order an opinion published if a majority of the justices participating in the decision conclude that it meets one of the following criteria (a) the opinion establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation that is likely to recur in future cases, (b) the opinion involves a legal issue of continuing public interest, (c) the opinion criticizes existing law, or (d) the opinion resolves an apparent conflict of authority. Tex. R. App. P. 47.4. Theoretically, under Rule 47, unpublished opinions should be opinions that are not controversial and do not involve questions on which the controlling authority is unclear, but in practice,

---

[9] *See* David M. Gunn, *Unpublished Opinions Shall Not be Cited As Authority: The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 St. Mary's L. J. 115, 130 (1992) (discussing Rule 90(i), the predecessor of Rule 47.7).

that is not always what happens. For example, in 2001, there were at least 36 unpublished decisions where one or more justices of the appellate court filed a dissenting opinion. (App. A70.)

C. As Unpublished Opinions Become More Readily Available, Courts and Commentators Have Recently Considered Whether Non-Publication Rules Violate the Constitution.

The question of whether rules like Texas Rule of Appellate Procedure 47 that forbid citation of unpublished opinions are constitutional has recently generated a great deal of controversy. This is due, in part, to recent technological advances that have allowed for easier access to unpublished decisions. Even ten years ago, if a decision was not published in an official state reporter or a West regional reporter, most attorneys and parties would not have ready access to it. But now, anyone with a computer and a connection to the Internet can find almost any opinion, officially published or not, on a court website, an academic website, or on Westlaw, Lexis, or some other computer-assisted-legal-research service.

Much of the recent conflict was touched off by the Eighth Circuit's decision in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.2d 1054 (8th Cir. 2000) (en banc). In *Anastasoff*, a panel of the Eight Circuit concluded that its local rule forbidding the citation of unpublished opinions was unconstitutional. The *Anastasoff* court noted that non-publication rules coupled with rules prohibiting citation of such opinions "assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they will not." *Anastasoff*, 223 F.3d at 904. The

panel, after a detailed study of the role played by precedent in our legal system, held that its local rule was an improper exercise of the judicial power under Article III of the United States Constitution. *Anastasoff*, 223 F.3d at 904-05. While the panel's decision was ultimately vacated as moot by the full Eighth Circuit, the panel's reasoning has led other courts and commentators to consider the issue.

In the wake of *Anastasoff*, other federal courts have weighed in on the question. For instance, in *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 618 (2001) (dissenting from denial of rehearing en banc), three Fifth Circuit judges dissented from a denial of a motion for rehearing en banc. The dissenting judges noted that in a previous unpublished decision, the Fifth Circuit held that Dallas Area Rapid Transit ("DART") was immune from suit under the Eleventh Amendment but in *Williams*, where DART was prohibited by Circuit Rule 47.5.4 from citing the previous opinion, the court reached the opposite conclusion. *Williams*, 256 F.3d at 262. The dissenting judges also recognized that "the issuance of unpublished, non-precedential opinions recently has come under more intense scrutiny." *Id.* In *Williams*, the judges also referenced "at least four opinions" in the first half of 2002 that while unpublished, included a dissent from at least one judge. *Williams*, 256 F.3d at 262. In contrast, the Ninth Circuit, in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), rejected the reasoning in *Anastasoff* and held that its local rule prohibiting citation of unpublished opinion was constitutional. *Hart*, 266 F.3d at 1180. Numerous commentators have also recently considered the

constitutionality and desirability of non-publication and no-citation rules.[10]

D. The Petition Should be Granted to Address Whether No-Citation Rules Violate This Court's Decision in *James B. Beam Distilling Co. v. Georgia* Prohibiting Selective Prospectivity Because an Unpublished, Uncitable Decision Allows a Court to Create a New Rule of Law That is Only Applicable to a Single Case and Litigant.

The Petition should be granted to consider whether rules like Texas Rule of Appellate Procedure 47 forbidding the citation of unpublished opinions are unconstitutional because they allow courts to engage in selective prospectivity, which is prohibited under this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). In *James B. Beam*, this Court addressed whether the Court's ruling in one case should apply retroactively to claims based on the same

---

[10] *See, e.g.*, Carl Tobias, *Anastasoff, Unpublished Opinions, and Federal Appellate Justice*, 25 Harv. J. L. & Pub. Pol'y 1171 (2002); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 Ind. L. Rev. 423 (2002); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 Stan. L. Rev. 1037 (2002); Johanna S. Schiavoni, *Who's Afraid of Precedent? The Debate over the Precedential Value of Unpublished Opinions*, 49 U.C.L.A. L. Rev. 1859 (2002); William J. Miller, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 Drake L. Rev. 181 (2001); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71 (2001).

facts occurring before the new decision was rendered. *James B. Beam*, 501 U.S. at 532. The Court's retroactivity analysis centered on whether it was allowable for a court to engage in selective prospectivity.

Selective prospectivity, as discussed in *James B. Beam*, occurs when a court overrules a precedent but only applies the new rule to the case in which it is announced, reverting to the previous precedent for other cases that predate the new decision. *James B. Beam*, 501 U.S. at 534-37.) In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court previously "abandoned the possibility of selective prospectivity in the criminal context . . .." *Griffith*, 479 U.S. at 318. In *James B. Beam*, the Court extended that principle to civil cases, noting that the "equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *James B. Beam*, 501 U.S. at 540 (citation omitted). In reaching this conclusion, this Court stated that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *James B. Beam*, 501 U.S. at 544.[11] In *Anastasoff*, the court noted that when a rule, like the Texas rule, prohibits citing unpublished opinions, courts "are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday." *Anastasoff*, 223 F.3d at 904. Courts issuing unpublished decisions that cannot be cited are effectively applying one rule to litigants in one case

---

[11]In his concurrence, Justice Scalia concluded that "selective prospectivity" was impermissible under the Constitution. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring).

while prohibiting litigants in a later case from even citing that rule as part of an effort to have the same rule applied.

In this case, the El Paso Court of Appeals' decision reflects such selective prospectivity. In 1994, the El Paso court held that as a matter of law, where owners assented to and accepted the benefits of a new operator's performance, they waived the JOA selection requirements. *Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 937 (Tex. App. – El Paso 1994, no writ). In this appeal, however, the three judges writing the opinion did not cite or reference the holding in *Purvis Oil*, which would have exonerated Cass. Instead, the panel held that the jury properly concluded that even though the owners assented to and accepted the benefits of a new operator's performance, they did not waive the JOA selection requirements. (App. A21-23.) The judges then ordered that the Cass opinion not be published. Two months later, in *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741 (Tex. App. – El Paso 2000, no writ), a published decision, the same panel of judges who affirmed a jury finding against Cass applied the *Purvis Oil* rule and held that under almost identical facts, such requirements had been waived. *Abraxas*, 20 S.W.3d at 750-51. By ordering that the decision affirming millions of dollars in liability against Cass not be published, the El Paso court took that decision out of the line of precedent. Its departure from *Purvis Oil* could not become a basis for review by the Texas Supreme Court, and in *Abraxas*, the court was free to ignore the holding against Cass because that holding applied to Cass and to no one else. Because the Texas rules prohibiting the citation of unpublished opinions create the very selective prospectivity disapproved by this Court, the Petition should be granted.

E. The Petition Should be Granted Because No-Citation Rules Violate Litigants' First Amendment and Due Process Rights.

The Petition should also be granted because no-citation rules like Texas Rule of Appellate Procedure 47 infringe on the free speech and due process rights of litigants like Cass. A no-citation rule prohibiting litigants from citing or talking about certain court opinions constitutes a content-based prior restraint on free speech in violation of the First Amendment. In addition, by preventing litigants from ever citing unpublished decisions, no-citation rules preclude litigants from arguing to a court that it should reach the same decision it did in a prior case and diminish a litigant's access to higher court review, all of which impact a litigant's due-process rights under the Constitution.

1. The Court Should Address Whether Non-Publication Rules Constitute Prohibited Content-Based Prior Restraints on Speech.

The Petition should be granted to determine whether non-publication rules like Texas Rule of Appellate Procedure 47.7 constitute content-based prior restraints on speech. The no-citation rule is not content neutral because it identifies particular expressive content, that is, unpublished decisions of the Texas appellate courts, and prohibits attorneys and litigants from citing or discussing those opinions in Texas courts. The First Amendment protects against prior restraints on the content of speech. *See Near v. Minnesota*, 283 U.S. 697 (1931), *Staub v. Baxley*, 355 U.S. 313 (1958), *New York Times Co. v. United States*, 403 U.S. 713 (1971). Cass, as a litigant in a Texas court, is prohibited from citing any Texas unpublished opinions and is therefore subject to this prior restraint. This Court has

previously recognized, in another context, that laws restricting the arguments that may be raised in court or limiting the analysis that courts may consider can be impermissible restrictions on free speech. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The Petition should be granted to address whether the widespread practice of prohibiting litigants like Cass from citing a large body of authority constitutes an impermissible prior restraint.

2. The Court Should Consider Whether No-Citation Rules, by Insulating Unpublished Decisions From Review and Denying Litigants Access to Relevant Case Law, Violate Litigants' Due-Process Rights.

The Petition should also be granted to review whether rules like Texas Rule of Appellate Procedure 47.7 deny litigants their due-process rights. Given the large body of case law that no-citation rules declare "off limits," such rules affect a litigant's right to due process. Texas Rule of Appellate Procedure 47.3 only allows parties to the litigation the opportunity to ask an appellate panel to reconsider its publication order. But whether an opinion really has precedential value often cannot be predicted by the panel or the parties to the actual case, and litigants in subsequent cases have no recourse even if they find the decision helpful. Thus, litigants sometimes find themselves in a position where the only Texas decision or decisions supporting an argument they wish to make are unpublished and cannot be cited, leaving litigants with the difficult task of persuading an appellate court to accept a particular rationale without any supporting authority.

No-citation rules also make it difficult, if not impossible, for a litigant like Cass to convince a higher court to review a court of appeals' unpublished decision. In this case, for instance, the

El Paso court considered the issue of whether COC replaced Cass as operator. The same issue was pending before the same court at the same time. A published opinion was issued in that case which, if it had been followed, would have led to a different result for Cass. *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 750-51 (Tex. App. – El Paso 2000, no writ) (as a matter of law, where owners assented to and accepted benefits of new operator's performance, they waived JOA selection requirements). Instead, in its unpublished decision, the Court of Appeals let the jury find no waiver. Clearly the decision here conflicts with *Abraxas* and involves an oil-and-gas issue of particular importance to Texas litigants. But Cass's chances of obtaining review in the Texas Supreme Court were reduced to practically zero when the El Paso court ordered that its opinion would not be published.

The Texas Supreme has limited discretionary jurisdiction to review civil decisions of the intermediate Texas appellate courts. Tex. Gov't Code § 22.001(a). In addition to specific provisions regarding decisions involving the Railroad Commission, state revenue, or state statutes, the Texas Supreme Court may review decisions where the court of appeals committed an error of law of importance to the state's jurisprudence, the court of appeals' decision conflicts with other Texas decisions, or a dissent was filed. Tex. Gov't Code § 22.001(a)(1),(a)(2), (a) (6). Here, the El Paso court's decision directly conflicts with other El Paso decisions as well as Texas Supreme Court decisions and involves significant oil-and-gas, due process, and limitations issues. But there was no dissent and the opinion is unpublished. The fact that an unpublished decision can never be cited in a Texas court certainly affects whether the Texas Supreme Court will determine if such a decision is of importance to the state's jurisprudence or actually conflicts with other published opinions. By invoking Rule 47,

an intermediate appellate court can establish that a decision is only important to the litigants of that case and not to future litigants, effectively giving the Texas intermediate court of appeals power over the Texas Supreme Court's docket. That is clearly what happened here, given that the Court of Appeals' decision directly conflicts with other Texas decisions and deals with important issues of statewide importance. Tex. Gov't Code § 22.001. Because no-citation rules prohibit litigants from invoking prior unpublished decisions and adversely affect litigant's access to further appellate review, the Court should grant the Petition and determine whether such rules violate litigants' due-process rights.

CONCLUSION

The issues presented in this Petition are important questions of law involving this Court's Due Process and First Amendment jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

Henry J Ackels

ACKELS & ACKELS, L.L.P.
HENRY J. ACKELS
LAWRENCE R. ACKELS, JR.
GREGORY K. ACKELS
2777 Stemmons Freeway, Suite 879
Dallas, TX 75207
(214) 267-8600
(214) 267-8605 (Fax)

Attorney for Petitioner Frank Cass

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7 UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Court of Appeals of Texas, El Paso.

Frank W. CASS and Michael L. Cass, Appellants,
v.
Patricia Love STEPHENS, Individually and as Trustee of the Walter H. Stephens Trust, the SSH Trust, the Sutton Elizabeth Stephens Irrevocable Trust, and the Heather Love Stephens Irrevocable Trust, Appellees.

No. 08-97-00582-CV.

Jan. 11, 2001.

Appeal from the 112th District Court of Reagan County, Texas, (TC#371).

—

Before Panel BARAJAS, C.J., McCLURE, and CHEW, JJ.

OPINION

CHEW.

This is an oil and gas accounting case. Plaintiffs, Patricia Love Stephens, individually and as Trustee of the Walter H. Stephens Trust, the SSH Trust, and the Sutton Elizabeth Stephens Irrevocable Trust, and the Heather Love Stephens Irrevocable Trust (collectively "Stephens"), were working interest owners of certain oil and gas wells operated by the defendants Frank W. Cass, individually and d/b/a Cass Oil Company, Michael L. Cass, William G. Cass, and Cass Oil

Company, Inc. Stephens sued the Cass defendants for breach of contract, conversion, and fraud. The Casses counterclaimed for breach of contract and defamation. A jury returned findings in favor of Stephens, finding Frank Cass, individually, liable for breach of contract, conversion, and fraud, and finding Michael Cass liable for conversion. The jury found against the Cass defendants on their counterclaims. The trial court entered judgment on the jury's verdict. On appeal, Frank and Michael Cass raise numerous points of error attacking the testimony of Stephens' expert witness, the legal and factual sufficiency of the evidence to support the jury's findings, and the trial court's imposition of sanctions for discovery abuses. We affirm.

SUMMARY OF EVIDENCE

In 1970, General Walter H. Stephens and Frank W. Cass formed an operating partnership known as Stephens & Cass. The partnership operated properties which General Stephens and Frank Cass acquired individually. From 1970 to 1977, the partnership successfully drilled and operated approximately sixty to seventy wells located in Reagan, Upton, Glassock, and Midland Counties.

In 1974, General Stephens' health began to decline. He suffered a broken hip and had to have surgery. Over the next two years, he had three more surgeries on his hip and eventually had to have his hip replaced. It appears that during this period, General Stephens was not able to meaningfully participate in the daily activities of the partnership. By late 1977, Frank Cass desired to terminate his relationship with General Stephens and bring his son Michael L. Cass into the business.

On October 1, 1977, General Stephens and Frank Cass entered into an "Agreement to Terminate" the partnership. By this agreement, the two men agreed to wind up the business by January 1, 1978. They further agreed: to notify all of the other joint interest owners that Stephens & Cass had agreed to terminate their obligations as operator under the joint operating agreements ("JOAs"); that Mr. Cass would attempt to succeed the partnership as operator; that if Mr. Cass succeeded in obtaining the necessary votes under the JOAs, he would continue to operate the wells pursuant to the existing agreements; that Stephens & Cass would marshal and inventory all personal property owned by the partnership so that it could be valued; and finally that the records of Stephens & Cass would remain the property of both men and would be available to either one as required.

Pursuant to the foregoing agreement and the various JOAs, formal written ballots were administered, and Mr. Cass was elected operator by a majority-in-interest of the well owners. On January 1, 1978, Mr. Cass and the General entered into a new operating agreement recognizing that Mr. Cass had been elected operator. In 1980, Mr. Cass and General Stephens reached an agreement and assigned values to the personal property which they jointly owned.

In January of 1979, the General slipped on a patch of ice outside his home and suffered a broken back. The General's wife, Patricia Stephens, took him to the hospital. Apparently, he became over-medicated and slipped into a coma while at the hospital. His air supply was cut off for a period of time. The General eventually recovered, but developed a condition known as Pickwickian Syndrome which caused him to sleep excessively. Mrs. Stephens testified that her husband slept almost twenty hours a day from 1979 until his death in 1984.

During this time, the General was unable to handle the vast majority of his financial affairs. Mrs. Stephens helped pay bills, but she testified that much of her husband's mail went unopened and that he failed to pay taxes for three years before his death.

After he became operator of the jointly-owned wells, Frank Cass threatened to resign on a number of occasions. He did so because he was discouraged by the working interest owners' failure to timely pay their monthly joint interest bills ("JIBs"). Mr. Cass related that he was being forced to put up his own money to pay vendors of the wells, and was losing money as the operator. In 1979, he sent a letter to all working interest owners stating that he was resigning as operator under the JOAs. The JOAs allowed an operator to resign, stating that all parties to the contract shall select by majority vote in interest a new operator. Nothing more was done or said about Mr. Cass's resignation and he continued to operate the wells for another three years. In 1982, Mr. Cass sent a letter notifying the working interest owners that he was changing the operator's name from his own to Cass Oil Company, Inc. From that point forward, all the working interest owners made their checks payable to Cass Oil Company, Inc., instead of Frank Cass.

On November 14, 1983, Mr. Cass purchased certain undeveloped lease-hold acreage from General Stephens. These undrilled locations were on the same leases as the jointly-owned wells ("the Stephens wells") and were direct offsets to them. The General passed away a few months after he executed those assignments. After the General died, his properties passed to Mrs. Stephens, the Walter H. Stephens Trust, the SSH Trust, the Sutton Elizabeth Stephens Irrevocable Trust, and the Heather Love Stephens Irrevocable Trust. In 1984, solely-

owned Cass wells were drilled on the offset locations ("the Cass companion wells").

In March of 1986, Mr. Cass sent Mrs. Stephens a letter proposing to shut in twenty-six of the Stephens' wells. Mrs. Stephens contacted Bob Franklin, an engineer who had appraised the wells for estate tax purposes following the General's death. Based on Mr. Franklin's advice, Mrs. Stephens wrote a letter asking Mr. Cass to show on a lease-by-lease basis how the leases would be held without production. In response, Mr. Cass called Mrs. Stephens and allegedly became very belligerent. Mrs. Stephens related that her conversation with Mr. Cass lasted for three hours, and that he was evasive and insulting. He told Mrs. Stephens that she did not know what she was talking about and neither did her engineer, her CPA, or her estate attorney.

Concerned that Mr. Cass was withholding information, Mrs. Stephens hired Gruy Petroleum Management Company ("Gruy") to conduct an audit of the revenue and expenses of the jointly-owned wells ("the Gruy audit"). She also hired a private investigator who recommended that she conduct a "trash cover"–a routine pick up of Cass Oil Company's trash. The Gruy audit resulted in separate reports for revenue and expenses. The audit was limited in scope and time; it covered revenue and expenses from 1984 to 1986. It reported major discrepancies, $2.9 million in expense exceptions and $9 million in revenue exceptions.

Pretrial Matters

Mrs. Stephens received the reports from Gruy in September of 1986. She then mailed copies to other working interest owners who had a financial stake in the wells. Mrs. Stephens filed suit

against the Casses on November 4, 1986. Her petition alleged among other things that the Casses had breached the JOAs, converted jointly-owned property, and committed fraud. The Casses answered, denied the allegations, and counterclaimed against Mrs. Stephens for failure to pay her joint interest bills.

The first 1,000 pages of the clerk's record reflect a long tortuous discovery battle. In July 1987, Stephens filed her first discovery request, seeking production of numerous documents. Over the ensuing months, a number of discovery hearings were held by the court and several orders were entered to compel discovery. Over the period from the actual commencement of discovery until May 1988, Cass produced and Stephens copied approximately 200,000 documents. In January 1988, Stephens filed a motion to compel further production and prevent destruction of documents. Also in January, Cass amended their answer asserting new and additional counterclaims against Stephens and against Gruy, for negligently or intentionally conducting an improper audit and publishing a false report.

In May 1988, a hearing was held on various motions for protective orders. There it was revealed for the first time that Stephens, through her investigators, had recovered between 150,000 to 200,000 documents from Cass Oil Company's trash. The "trash cover" testimony indicated that Mr. Cass had been systematically discarding potentially discoverable documents both before and after the filing of the lawsuit. Entire original files were thrown out, including the pump installation and well development files which were necessary to audit the joint interest accounts and to trace the movement of jointly-owned equipment. Mr. Cass even tore up and discarded the only signed copy of the original operating agreement.

In June of 1988, Stephens moved for sanctions against the Cass defendants for their repeated discovery abuses. The trial court set a hearing for September 12, 1988. The Casses then filed a motion to exclude or suppress the trash documents. The hearing on the motion for sanctions and the motion to exclude or suppress evidence started on September 12, and lasted eight days. On November 1, 1988, the trial court denied the Casses motion to exclude or suppress the trash documents. On November 7, 1988, the hearing on the motion for sanctions resumed and continued for four days during that month. The hearing resumed on April 3, 1989, and continued for eight days. Closing arguments were held on October 23, 1989. The trial court rendered an order imposing sanctions against the Casses on May 7, 1990. Among other things, the trial court's order struck the Cass defendants' answers, dismissed with prejudice the counterclaims, and entered a default judgment as to liability against them. All told, the hearing on the motion for sanctions lasted twenty-one days, involved more than eight witnesses, and cover over 4,000 pages of reporter's record.

Appeal was taken to our Court. We dismissed for lack of jurisdiction holding that the trial court's order was not a final judgment and not appealable. See Cass v. Stephens, 823 S.W.2d 731, 734 (Tex.App.–El Paso 1992, no writ). In dismissing the cause, we suggested that the trial court reconsider its decision under the Texas Supreme Court's holdings in Trans America National Gas Corp. v. Powell, 811 S.W.2d 913 (Tex.1991) and Braden v. Downey, 811 S.W.2d 922 (Tex. 1991). In November of 1993, pretrial matters were resumed. For the next thirteen months the parties continued the discovery process. In January of 1995, the Casses filed a number of motions for summary judgment based on limitations. In February, the Casses moved to disqualify Stephens' expert witness, Harold Eldridge. Stephens responded to the motions.

On August 28, 1995, a hearing was held on the motion to disqualify Stephens' expert. The hearing lasted for two days. On September 5, 1995, the trial court denied the motion.

In November of 1995, the Casses moved for summary judgment on approximately seven different issues in the case. Stephens responded to the motions. The trial court denied the motions for summary judgment on March 18, 1996. Trial was then set for February 10, 1997. The Casses' attorney withdrew on November 5, 1996. The case was continued, and a new trial date was set for May 19, 1997. The Casses' new counsel did not appear until May 5, 1997.

The Trial

The case went to trial on May 27, 1997, and was tried over the course of the next five weeks, finally ending on June 26, 1997. Stephens put on evidence showing that Frank Cass was the operator of the wells and that Cass Oil Company, Inc., was never elected operator or, alternatively, was the alter ego of Frank Cass. Harold Eldridge, Stephens' accounting expert, explained the evidence supporting the allegations against the Casses. He testified that the documentary evidence showed Frank Cass: made unauthorized expense charges on the jointly-owned Stephens' wells; overcharged expenses to the Stephens' wells; repeatedly charged expenses incurred on the Cass companion wells to the Stephens' wells; often made the joint owners of the Stephens' wells pay for equipment they already owned; and finally converted jointly-owned equipment for use on the Cass companion wells without issuing credit to the joint interest owners of the Stephens' wells. Numerous witnesses established that Frank Cass had thrown away thousands of documents which were necessary to audit the expenses incurred

on the Stephens' wells, and to trace the movement of equipment from one well to another.

Mr. Eldridge's five volume report was admitted into evidence. The report summarized his testimony and shows on a per well basis his conclusions regarding the joint interest accounts. Stephens also admitted into evidence the report compiled by the Cass Defendants' accounting expert, Mr. David McKinnon. Stephens showed that Mr. McKinnon agreed with some of Mr. Eldridge's conclusions. In addition, hundreds of documents were admitted into evidence in support of Mr. Eldridge's report. The documents consist of material transfer invoices, well development files, operating agreements, the Agreement to Terminate, and various other documents.

The Cass Defendants put on evidence attempting to show that Cass Oil Company, Inc. was the operator of the wells. Counsel for the defendants repeatedly asserted that Mr. Eldridge's conclusions were not trustworthy and were biased in favor of Stephens. The Cass Defendants stated that the testimony and conclusions of its own accounting expert, Mr. David McKinnon, were more reliable. Portions of McKinnon's deposition were read into the record. The Cass Defendants also put on evidence showing that Stephens had not paid a portion of her 1986-87 joint interest billing and, thus, owed them money. Both Frank and Michael Cass maintained that Mr. Eldridge's conclusion were incorrect, that they had done nothing wrong, and that both Gruy and Mrs. Stephens had slandered them.

The Jury's Verdict

The jury considered the evidence and returned a verdict in favor of Stephens and against Frank and Michael Cass. Specifically,

the jury found: that Frank Cass was the operator of the wells; that Cass Oil Company, Inc., was also the alter ego of Frank Cass; that Frank Cass had breached the operating agreements; that he had fraudulently concealed his breach; that Frank Cass committed common-law fraud by charging Stephens for goods and services that were never furnished to the Stephens' wells; that Frank and Michael Cass converted jointly-owned property for their own personal benefit; that Stephens had not breached the operating agreements; and that she had not defamed the Cass defendants.

The jury awarded Stephens $317, 905.59 as breach of contract damages accruing during the limitations period; $258,256.58 as breach of contract damages accruing outside the limitations period, but recoverable because of a fraudulent concealment finding; $68,136.69 as fraud damages accruing during the applicable limitations period; $33,164.23 as fraud accruing outside the limitations period, but recoverable because of a discovery rule finding; $14,070.38 as conversion damages accruing during the applicable limitations period; $84,710.44 as conversion damages outside the limitations period, but recoverable because of a discovery rule finding; $1,400,000 in attorney's fees for preparation of the breach of contract claim; $100,000 for an appeal to this Court; and $25,000 if a writ of error is granted by the Texas Supreme Court.

Exemplary Damages

The jury heard additional testimony from Sutton and Patricia Stephens regarding the toll that the years of litigation had taken on them. The jury also heard from Frank, Michael, and Gregory Cass. Frank Cass asserted that he had exhausted his resources in defending the lawsuit and was strapped by debt. He specifically denied transferring any of his assets to his other

family members in order to become judgment proof. Michael Cass testified in much the same vein, maintaining that he had no money despite being president of a publicly traded petroleum corporation. The jury was charged and later returned with a verdict awarding damages to Stephens. The jury awarded Stephens $5 and $15 million against Frank Cass for committing common-law fraud and conversion, respectively. The jury then awarded Stephens $20 million against Michael Cass for his conversion of jointly-owned property.

Post Trial Matters

The Casses moved for judgment notwithstanding the verdict ("jnov"). The trial court denied the motion and entered judgment on the jury's verdict. The trial court's award included an additional $978,492.10 as a monetary sanction against Frank Cass for his discovery abuses. Frank and Michael Cass filed individual motions for new trial. The trial court overruled the motions by written order. Stephens voluntarily remitted $15 million of the awards against Frank Cass-$2.5 million of the fraud award and $12.5 million of the conversion award. Stephens also voluntarily remitted $17.4 million of the award against Michael Cass. Frank and Michael Cass timely filed separate notices of appeal and have filed separate briefs.

SUMMARY OF THE ISSUES

Frank Cass raises six points of error: (1) there was insufficient evidence that he was personally liable for breach of contract, fraud, and conversion; (2) the evidence was insufficient to allow Stephens to recover outside the limitations period under the JOAs or, alternatively, the discovery and fraudulent concealment rules should not apply to toll the running of the appropriate limitation periods under each cause of action; (3)

there is insufficient evidence to support the jury's award of exemplary damages; (4) there is insufficient evidence to support the award of compensatory damages; (5) there is insufficient evidence to support the jury's award of attorney's fees; and (6) the trial court erred in determining that sanctions should be imposed.

Michael Cass raises five points of error: (1) the failure to properly account for property moved between wells cannot as a matter of law constitute conversion; (2) there is insufficient evidence that he personally converted jointly-owned property; (3) there is insufficient evidence of the amount of damages resulting from his alleged conversion; (4) the discovery rule is inapplicable as a matter of law; and (5) the exemplary damages are unfounded and unjust.

EXPERT TESTIMONY

We first address Eldridge's qualifications as an expert witness. This is a threshold issue because Eldrige's testimony provides crucial evidence to support many of the jury's findings. Although Frank and Michael have not attacked Eldridge's qualifications by separate point of error, they have included attacks on his qualifications as component parts of their challenges to the jury's findings of liability and its award of actual and exemplary damages. We will therefore resolve the issue of Eldridge's competence, first, and address the more specific challenges to his testimony where appropriate.

The admissibility of expert testimony is governed by Rule 702 of the Texas Rules of Evidence. See Tex.R.Evid. 702. The qualification of a witness as an expert is within the trial court's discretion. Broders v. Heise, 924 S.W.2d 148, 151 (Tex.1996). Rule 702 contains three requirements for the admission of

expert testimony: the witness must be qualified; the proposed testimony must be scientific, technical, or other specialized knowledge; and the testimony must assist the trier of fact to understand the evidence or to determine a fact issue. See Tex.R.Evid. 702; E.I. du Pont De Nemours & Co. v. Robinson, Inc. 923 S.W.2d549, 556 (Tex.1995). The party offering the expert's testimony bears the burden to prove that the witness is qualified under Rule 702. See Gammil v. Jack-Williams Chevrolet, Inc., 972 S.W.2d 713, 718 (Tex. 1998). The offering party must demonstrate that the witness possesses special knowledge as to the very matter on which he proposes to give an opinion. Id. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. Robinson, 923 S.W.2d at 558; In re M.D.S., 1 S.W.3d 190, 203 (Tex.App.–Amarillo 1999, no pet.).

Eldridge testified that he grew up around the oil and gas business, assisting his father in his used oil field equipment business through high school and college. In 1966, he graduated from McMurray College with B.B.A. with emphasis in accounting. He became a certified public accountant ("CPA") in March of 1968. After college, he worked for Arthur Anderson & Company in Dallas, Texas, with clients engaged in the oil and gas, cement, manufacturing, and processing industries. He then became Vice President of Finance and Controller of Harding Brothers Oil Company, a company engaged in drilling, completing, and operating oil and gas wells. Eldridge related that he was responsible for all accounting functions, including billing on joint interest accounts. He was also responsible for accounting for new and used equipment of a Harding affiliate company called Pipe & Supply, Inc. After Harding, Eldridge worked for at least five other oil and gas companies. His duties routinely required him to handle accounting functions, joint interest billings, and tax matters.

Next, Eldridge became managing partner and tax partner in charge of Coopers & Lybrand, Midland, Texas. There, he was responsible for the firm's due diligence activities. Since 1991, Mr. Eldridge' has been a solo practitioner and consultant. In 1992, he also served as Bankruptcy Trustee for an oil and gas company that operated about 550 oil and gas wells.

Eldridge explained that he has performed joint interest audits of oil and gas operators for over twenty years. He spent approximately ten years with companies that operated hundreds of oil and gas wells. He related that he has extensive knowledge regarding operating agreements, title opinions, division of interest, joint interest billings, revenue distribution, accounting, billing, and collection. He is a member of the Council of Petroleum Accountants Society ("COPAS") and has served on the tax committee and the audit committee for the Permian Basin chapter. COPAS is the recognized authority for the petroleum accounting industry and is responsible for promulgating accounting procedures which are attached to virtually every operating agreement. Eldridge is also a meember of the American Institute of Certified Public Accountants ("AICPA"), and the Texas Society of Certified Public Accountants.

Eldridge was offered as an expert in petroleum accounting. Clearly, he possessed the requisite knowledge, skill, experience, training, and education regarding that specific issue. He was therefore qualified to give an expert opinion as to whether the Cass Defendants complied with the proper accounting procedures under the operating agreements. The proposed testimony was scientific, technical, and specialized. The testimony of a petroleum accountant would have clearly assisted the trier of fact to understand the evidence presented in this case, and would have helped the jury to determine the fact

issues posed by the parties. We therefore conclude that the trial court did not abuse its discretion by admitting the testimony.

The Casses complain, however, that "Eldridge employed his own, self-invented, untested, and non-industry approved accounting method rather than the widely used and industry approved COPAS accounting procedure..." Specifically, the Casses refer to Eldridge's use of a "Contract Compliance Verification Procedures." The Casses assert that this method of accounting is not recognized by any authority, is undefined, untested, and incapable of peer review because only Eldridge knows what the procedures entail. Their claim is founded on Eldridge's report wherein he stated that he called his auditing procedures "Contract Compliance Verification Procedures."

This complaint is not new, the Casses presented this claim to the trial court in their motion to disqualify Eldridge. The trial court held a two day hearing on the matter and overruled the Casses' motion. The Casses reasserted their motion before Eldridge began testifying. The trial court overruled their objection. On direct examination during trial, Elridge explained that the term "Contract Compliance Verification Procedures" was taken from COPAS Bulletin Number 3, Paragraph B which states that an expenditure audit of a joint account serves two main purposes: *verifying* and authenticating account charges and assuring *compliance with the operating agreements*. Throughout the litigation of this case, whether it was during his deposition, the hearing on the motion to disqualify, or during trial, Eldridge did not waiver in his testimony that he followed accepted accounting methods and standards. Specifically, he relied on COPAS Bulletin Numbers 3, 5, 6, 8, 16, 23, and 26, various pronouncements of AICPA, and the Rules of the Texas State Board of Public Accounting. These bulletins and pronouncements are all recognized as

authoritative and controlling in auditing joint interest accounts. We conclude that the trial court did not err by admitting Eldridge testimony. Accordingly, we overrule Frank and Michael's general complaints that the trial court abused its discretion by admitting Eldridge's testimony under Rule 702.[1]

STANDARDS OF REVIEW

Because we will address numerous challenges to the sufficiency of the evidence, we first summarize the applicable standards of review.

Legal Sufficiency

"Legal sufficiency points of error assert a complete lack of evidence on an issue, and are designated as 'no evidence' points or 'matter of law' points, depending upon whether the complaining party had the burden of proof." W. Wendell Hall, Standards of Review of Texas, 29 ST. MARY'S L.J. 476-77 (1998). When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof at trial, appellant must demonstrate on appeal that there is "no evidence" to support the adverse finding. Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX.L.REV. 361, 364-68 (1960). The traditional statement of the "no evidence" standard of review is that the reviewing court considers only the evidence and inferences that tend to support the findings and disregards all evidence and inferences to the contrary. See Garza v. Alviar, 395 S.W.2d

---

[1]These complaints involve arguments contained within Frank's Point of Error 4, and Michael's Points of Error 3, 4, and 6.

821, 823 (Tex. 1965); Merrell Dow Pharmeceuticals, Inc. v. Havner, 953 S.W. 3d 706, 711 (Tex. 1997). A no evidence point will be sustained only when the record discloses: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. 38 TEX.L.REV. at 363-63. More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" Havner, 953 S.W.2d 711.

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he had the burden of proof at trial, he must demonstrate on appeal that all vital facts in support of the issue were conclusively established by the evidence, or as a "matter of law." Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); Kratz v. Exxon Corp., 890 S.W.2d 899, 902 (Tex.App.–El Paso 1994, no writ.). In reviewing a "matter of law" challenge, the reviewing court engages in a two-step analysis. First, the record must be examined for evidence that supports the jury's finding, while ignoring all evidence to the contrary. Second, if there is no evidence to support the fact finder's answer, then, the entire record must be examined to see if the contrary proposition is established as a matter of law. See Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 940 (Tex.1991).

Factual Sufficiency

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of

the evidence as to be manifestly wrong. When the party having the burden of proof complains of an unfavorable finding, the point of error should allege that the findings "are against the great weight and preponderance of the evidence." The "insufficient evidence" point of error is appropriate only when the party without the burden of proof on an issue complains of the court's findings. See Kimsey v. Kimsey, 965 S.W.2d 690, 700 (Tex.App.–El Paso 1998, pet. denied).

The test for factual insufficiency points is set forth in In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing an insufficiency of the evidence challenge, we must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. Id. After having done so, we will only set aside the finding if the evidence which supports the jury finding is so weak as to be clearly wrong and manifestly unjust. See 29 ST. MARY's L.J. at 483-86. In reviewing a challenge that the jury finding is against the great weight and preponderance of the evidence, we must first examine the record to determine if there is some evidence to support the finding. If such is the case, then we must determine, in light of the entire record, whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, or whether the great weight and preponderance supports its nonexistence. See 29 ST. MARY'S L.J. at 483-86.

In assessing a factual insufficiency point of error, we are guided by the rule that the reviewing court cannot substitute its conclusions for those of the fact finder. In re B.R., 950 S.W.2d 113, 121 (Tex. App.–El Paso 1997, no pet.). If sufficient competent evidence of probative force exists to support the finding, it must be sustained. Id. We may not interfere with the

fact finder's resolution of conflicts in the evidence or pass on the weight or credibility of the witnesses' testimony. Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 796 (1951); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex.1994). Where conflicting evidence is present, the fact finder's determination on such matters is generally regarded as conclusive. Kimsey, 965 S.W.2d at 700; In re B.T., 950 S.W.2d at 121.

We note that the record is incomplete. The reporter's record shows that numerous exhibits were admitted into evidence. Only a portion of those are in the record here. It is observed that the Appellants have not properly designated a partial reporter's record pursuant to Tex.R.App.P. 34.6(c). At oral argument, we requested that the parties supplement the record with the exhibits they thought were necessary for our review. We have not received any supplementary exhibits. In order to obtain a reversal, appellant has the burden to come forward with a record showing error which warrants reversal. See Murray v. Devco, Ltd., 731 S.W.2d 555, 557 (Tex.1987). Because we have been asked to review a number of sufficiency challenges, the fact that we do not have a full record will impact our analysis of some issues. Under a legal sufficiency standard, we must be able to ascertain all of the evidence which supports the judgment in order to determine whether there is more than a scintilla of evidence in order to weigh the competing groups and determine whether the jury's verdict is clearly wrong or manifestly unjust. Generally, we presume that omitted evidence supports the findings of the jury and the judgment of the trial court. Murray, 731 S.W.2d at 557.

PERSONAL LIABILITY

In his first point of error, Frank Cass asserts that the evidence is legally and factually insufficient to support the jury's findings that he was personally liable for the actions of Cass Oil Company, Inc. We focus on two findings by the jury: (1) that Frank Cass remained operator under JOAs; and (2) that Cass Oil Company, Inc. is the alter ego of Frank Cass

Operator Finding

In question number one, the jury was instructed that Frank Cass became operator of the properties on January 1, 1978, by a majority-in-interest vote. The jury was then instructed that an operator may resign from his duties at any time upon written notice, and that all parties to the agreement shall then select a new operator by majority-in-interest vote. The jury was further instructed that Frank did not remain operator if a majority-in-interest waived the requirement for an affirmative vote by consenting to the substitution of Cass Oil Company, Inc. as operator. Waiver was defined as an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

On appeal, Frank argues that there is "no evidence" or "insufficient evidence" to support the jury's finding that he remained operator. He asserts that Stephens had notice of the change in operators and did not object. He relies on his own testimony that General Stephens consented to the change in operators. He also relies on evidence showing that Stephens made payments to Cass Oil Company, Inc., and that the Railroad Commission recognized Cass Oil Company, Inc., as the operator of the wells.

Considering his legal sufficiency challenge, first, we observe that Frank essentially argues that he established a waiver as a matter of law. Waiver is an affirmative defense. See TexR.Civ.P. 94. To succeed on appeal, he must demonstrate that all vital facts in support of the issue were conclusively established by the evidence. See Sterner, 767 S.W.2d at 690; Kratz, 890 S.W.2d at 902. In applying the first step of our two-step analysis, we first consider whether there is any probative evidence to support the jury's finding. Kratz, 890 S.W.2d at 902.

Here, Frank admitted that he did not follow through with his 1979 resignation letter, and remained the operator for the next three years. The parties stipulated that none of the JOAs identified Cass Oil Company, Inc., as operator. The only document which purports to change the operator name is the 1982 letter on Cass Oil Company, Inc. letterhead which notified the joint interest owners that the operator, Frank Cass, was changing his name to Cass Oil Company, Inc. Mr. Eldridge testified that operators often change their names without changing the entity itself. Mrs. Stephens said that Frank did not need her permission to change his name. Mrs. Stephens and another interest owner, Bert Nelson, testified that they always looked to Frank as the operator of the wells. It is undisputed that Cass Oil Company, Inc. was never elected operator, did not solicit any votes to become operator, and that Mr. Cass knew and understood the procedure for changing operators.

We conclude that there is legally sufficient evidence to support the jury's finding that Frank remained operator. There clearly was a conflict in the evidence about which reasonable minds could disagree. The jury was instructed on waiver, heard Mr. Cass's theory of the evidence, and impliedly rejected his argument. Waiver is inherently a jury question. See Huffington

v. Upchurch, 532 S.W.2d 576, 580 (Tex.1976). Finding evidence to support the finding, we dispense with the second step of our two-party analysis. Frank's legal sufficiency challenge is overruled.

We next consider whether the evidence is factually sufficient to support the jury's finding. Because Frank had the burden of proof to establish his waiver defense, we consider whether the jury's findings are so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As stated above, there was some evidence which supports the jury's finding, thus, we concentrate on the evidence which conflicts with the jury's finding. Frank relies primarily upon the 1979 resignation letter, the 1982 change-of-name letter, the fact that no one objected to the change in the name of the operator, the fact that all of joint interest owners made payment to Cass Oil Company, Inc., and the fact that the Texas Railroad Commission recognized Cass Oil Company, Inc. as the operator of the wells. This evidence is significant, however, it is not conclusive on the issue of waiver. Frank's purported resignation is controverted by the fact that he remained the operator for three years after his alleged resignation. The operating agreements were never amended to show the election of a new operator. The JOAs are the basis for the parties legal rights, duties, and liabilities. The fact that no one objected to the change in the operator's name does not prove that the operator in fact changed from Frank Cass to Cass Oil Company, Inc. In addition, the fact that the Railroad Commission recognized Cass Oil Company, Inc. as the operator does not conclusively establish the matter as between the parties to the JOAs.

Here, the question of waiver centers on the intent and actions of the parties. The parties made a contract and provided that there

was a specific and technical way to elect a new operator. Frank's evidence permits an inference that Stephens and the other joint interest owners may have waived their objections to the substitution of Cass Oil Company, Inc., as operator, but it is not the only reasonable inference to be drawn from the evidence. The issue of waiver required the jury to weigh the testimony of Frank Cass against that of Mrs. Stephens, Bert Nelson, and Mr. Eldridge. It required that the jury resolve a clear conflict in the evidence. We conclude the jury's finding that Frank Cass remained operator, and its implied finding that Cass Oil Company, Inc., failed to become operator by waiver is not so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, Frank Cass's factual sufficiency challenge is overruled.

Alter Ego Finding

Here, Frank contends that there is no evidence or insufficient evidence to support the finding. Specifically, he argues that there is no evidence or insufficient evidence that he used Cass Oil Company, Inc., to commit an actual fraud for his own direct personal benefit.

Under the alter ego theory, courts disregard the corporate entity when there exists such unity between corporation and individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice. Mancorp, Inc v. Culpepper, 802 S.W.2d 226, 228 (Tex.1990), citing Castleberry v. Branscum, 721 S.W.2s 270, 272 (Tex. 1986). An alter ego relationship may be shown from the total dealings of the corporation and the individual. Id. at 272. This showing may include evidence of "the degree to which corporate formalities have been followed and corporate and

individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes." Id. In order to hold a shareholder liable for a corporation's actions, Article 2.21 of the Texas Business Corporations Act requires a plaintiff to prove that the shareholder caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the plaintiff primarily for the direct benefit of the shareholder. See Tex.Rev.Civ.Stat.Ann. art. 2.21(A)(2)(Vernon Supp.2001); see also, Menetti v. Chavers, 974 S.W.2d 168, 173175 (Tex.App.–San Antonio 1998, no pet.)

Frank first complains that there is no finding that he used Cass Oil Company, Inc., to commit an actual fraud on Stephens. He asserts that the jury's finding must be overturned because Article 2.21 requires a specific finding of actual fraud in connection with an alter ego finding. We agree that Article 2.21 requires a finding of actual fraud, but we disagree with his contention that there is no such finding in this case. The jury was instructed that it could not find Cass Oil Company, Inc. was the alter ego of Frank unless it also found that Frank caused Cass Oil Company, Inc. to be used to perpetuate an actual fraud on Stephens. Thus, the jury impliedly found that Frank used the corporation to commit an actual fraud on Stephens when it found that the corporation was his alter ego. Frank made no objection to submitting the charge in this form and has not asserted on appeal that there is any error in the trial court's charge to the jury. Instead, he has chosen to attack the sufficiency of the evidence to support the alter ego finding. Additionally, we note that the jury specifically found that he committed common-law fraud by misrepresentation in question number thirteen of the jury charge. As a consequence, his complaint that there is no finding of actual fraud is overruled.

We now turn Frank's legal sufficiency challenge to the implied finding of actual fraud. Stephens had the burden of proving that Frank caused Cass Oil Company, Inc. to perpetrate an actual fraud on her for his own direct benefit. Actual fraud by misrepresentation consists of a representation that is: (1) material; (2) false; (3) knowingly false or made with reckless disregard for its truth and falsity; (4) made with the intention that it be acted upon by the other party; (5) relied upon by the other party; and (6) damaging to the other party. Menetti, 974 S.W.2d at 175.

Stephens put on evidence showing that the Stephens' wells were billed for numerous goods and services provided solely to the Cass companion wells. Mr. Eldridge testified that Cass Oil Company billed the Stephens' wells for ad valorem tax services, salt water hauling services, electricity, and road work, which were incurred by Cass companion wells. Moreover, Eldridge explained that numerous delivery tickets and vendor's invoices were modified by Frank in order to divert expenses from the Cass companion wells to the Stephens' wells. The jury was shown exhibits which apparently showed that Frank modified the tickets and invoices, and approved the charges, often with his own handwriting. Those documents, Plaintiff's Exhibits 1202 A through 1202 TTT, are not a part of the record on appeal, but were admitted into evidence.[2] Mr. Eldridge's report also contains evidence that Stephens was charged operating expenses for wells that were inactive.

From this evidence, a jury could rationally find that Frank used Cass Oil Company, Inc. to perpetuate a fraud on Stephens. The

---

[2] Apparently, these exhibits consist of four boxes of notebooks containing invoices, material transfer orders, and other documents supporting Eldridge's conclusions.

evidence shows that he charged expenses incurred on the Cass companion wells to the Stephens' wells. These charges showed up on the joint interest bills as apparently legitimate charges for operating expenses. The charges were material representations that Stephens owed money for expenses which she in fact had not incurred. A rational jury could have found that Frank knowingly submitted the false bills from the fact that he personally altered and signed many of the tickets and invoices which misallocated the operating expenses. It is also reasonable to infer that the bills were made with the intent that Stephens rely upon them. There is evidence that she in fact paid the bills to her detriment. Viewed in the light most favorable, we conclude that there is legally sufficient evidence to support the jury's implied finding. Accordingly, we overrule Frank's legal sufficiency challenge.

We now consider whether the evidence is factually sufficient to support the jury's implied finding, and turn to the evidence which conflicts with the jury's determination. Frank urges that we consider the fact that he owned an equal if not greater interest in the Stephens' wells than Appellees. He points out that if the Stephens' wells were improperly charged, then he was improperly charged as well. He also relies on Eldridge's statement that he could not find any evidence that Frank personally received any money from the affiliate companies that overcharged the Stephens' wells for goods and services. Frank argues that there is no proof that any of the overcharges benefitted him personally.

We are unpersuaded by this argument. Assuming he paid the charges, he is no doubt correct in asserting that he still had to pay a proportional share of the misapplied charges. But that does not end our analysis. The evidence clearly shows that Frank generally owned an interest of 43.7 percent to 50 percent

in the Cass companion wells, with his own family members owning the rest. By contrast, Frank Cass generally owned smaller interests in the Stephens' wells–anywhere from a low of 12 percent to a high of 50 percent— with the remaining interest owned by Stephens and various other persons. Allocating charges to an account in which an individual owns a smaller interest benefits him economically. If he bills $100 to an account that he owns a 50 percent share in, he pays $50. If he misallocates a bill of $100 to an account that he owns a 20 percent share in rather than an account that he owns a 50 percent interest in, then he pays $20 rather than $50. The jury could properly infer that Frank personally benefitted from the misallocation of expenses to the Stephens' wells. The jury was also at liberty to consider the benefit which inured to Frank when his family received free goods and services at the expense of others. Having assayed all the evidence, we conclude that the evidence that supports the jury's verdict is not so weak as to be clearly wrong and manifestly unjust. Frank's factual sufficiency complaint is overruled.

In Summary, we conclude that there is both legally and factually sufficient evidence to support the jury's findings that Frank remained the operator under the JOAs, and that Cass Oil Company, Inc. was his alter ego. Frank's first point of error is overruled.

FRAUD

In his fourth point of error, Frank complains that there is legally and factually insufficient evidence to support the jury's findings that he committed fraud and conversion. As noted, the jury found that Frank Cass had committed common-law fraud by misrepresentation in question number thirteen of the jury

charge. In light of our analysis above, we overrule Frank's sufficiency challenge to the fraud finding.

CONVERSION

We now consider Frank and Michael's attack on the jury's conversion findings.[3]

Here, the JOAs created a cotenancy relationship. Rankin v. Naftalis, 557 S.W.2d 940, 946 (Tex. 1977); Hamilton v. Texas Oil & Gas Corp. 648 S.W.2d 316, 321 (Tex.App.–El Paso 1982, writ ref'd n.r.e.); Donnan v. Atlantic Richfield, 732 S.W.2d 715, 717 (Tex.App.–Corpus Christi 1987, writ denied). Each working interest owner held an undivided interest in the property. A cotenant has the right to be in possession of the property in which he owns an interest. Todd v. Bruner, 365 S.W.2d 155, 160 (Tex. 1963); Tynes v. Mauro, 860 S.W2d 168, 176 (Tex.App.–El Paso 1993, writ denied). The operator was given full control of all operations, but each working interest owner had the right to enter the common estate.

A cotenant may maintain a conversion suit against another cotenant who has appropriated the entire commonly owned property for his own use and benefit. Grabes v. Fawcett, 307 S.W.2d 311, 315 (Tex.Civ.App–Texarkana 1957, no writ). If possession is initially lawful, demand and refusal to return the property may be required for the cause of action to accrue. See Hofland v. Elgin Butler Brick Co., 834 S.W.2d 409, 413 (Tex.App.–El Paso 1990, no writ). Demand and refusal are not necessary, however, when the possessor's acts manifest a clear

---

[3] This challenge involves a portion of Frank's fourth point of error, and Michael's first, second and third points of error.

repudiation of the plaintiff's rights. Whitaker, 850 S.W.2d at 760; Hofland, 834 S.W.2d at 414.

The record contains evidence that jointly-owned equipment was transferred from Stephens' wells to Cass companion wells. Eldridge's report contains a section related to material transfers. His five volume report goes into detail on a well-by-well basis and summarizes the transfers of jointly-owned equipment to the Cass companion wells. Eldridge testified that he was able to reconstruct the movement of the jointly-owned equipment by using the trash documents. Exhibits 704, 704A, 706, and 708 are handwritten notes by Cass employees concerning the material transfers. Exhibits 707, 707A, and 707B, are Frank's own handwritten notes concerning the material transfers. Using these handwritten notes, various development files thrown away by Frank, Eldridge discovered that the Casses transferred jointly-owned equipment to the companion wells without giving credit to the Stephens' wells. The Casses later sold their interests in the companion wells to a third party for $12 million.

One of the examples given to the jury was the equipment transfers regarding the Ganze 7-1 well. Exhibit 708 shows that a pump jack was moved to the Ganze 7-1, a Stephens' well, in November 1975, and the joint account was billed $14,850. In February 1980, the pump jack was moved to the Driver 34-2, another Stephens' well. The joint account was again billed another $14,850 for the pump plus $1,200 for a concrete base, and no credit was issued to the Ganze well. Later, the pump jack was moved to the Smith 1, a Cass companion well, and no credit was issued to the Driver. The net effect of these transfers is that Stephens paid twice for a pump jack, that was then moved to a Cass companion well, and was later sold to a third party, without any credit being issued for the transfers.

First, Frank and Michael both assert that there is legally and factually insufficient evidence to support a conversion finding because there is no proof that their exercise of dominion and control over the property was unauthorized or unlawful. Specifically, they argue that the COPAS accounting procedures attached to the JOAs authorized the operator to move jointly-owned equipment between the wells, and also authorized the operator to purchase or take equipment in kind. They contend that their failure to properly account for the movement of equipment was a breach contract, not conversion. We disagree.

We find compelling evidence which supports the jury's findings. The evidence shows that Frank and Michael moved jointly-owned equipment to their solely owned wells without giving credit to the joint accounts. The evidence also shows a pattern of abuses by the Casses: making the joint interest owners pay multiple times for the same property; discontinuing their procedures for documenting material transfers thereby making it harder to trace the property movements transfers; the destruction of documents which show the equipment transfers; failing to give the Gruy auditors the documents necessary for tracing the equipment; and finally the sale of the jointly-owned property to a third party.

From this evidence, the jury reasonably could infer that the accounting errors were not just fortuitous or by accident, but were intentionally done so that the Casses would benefit at the expense of others. The evidence clearly supports the findings that Frank and Michael unlawfully appropriated the jointly-owned equipment for their own use and benefit. While accounting procedures authorize the operator to purchase jointly-owned equipment, the context here is that the Casses removed large amounts of jointly-owned equipment to their solely owned wells without paying for the equipment. The facts

also show a pattern of deception concerning the movements of the equipment and an attempt to hide the transfers. These facts may prove a breach of the operating agreements, but they also support a claim for conversion. Considering the evidence, the jury was free to infer that the prolonged retention of the equipment without payment was an act of conversion and not merely a breach of contract. We conclude that there is legally and factually sufficient evidence to support the jury's findings.

Second, Michael Cass claims that there is insufficient evidence that he personally converted any equipment. He asserts that the evidence does not support a finding that he used the property for his own personal benefit. Essentially, he claims ignorance of the accounting errors made by his father. He argues that he should not be responsible for his father's wrongful acts.

A corporate offices or agent is always primarily liable for his own torts, even though the principal is also vicariously liable. Permian Petroleum Co. v. Barrow, 484 S.W.2d 631, 634 (Tex.Civ.App.–El Paso 1972, no writ); Portlock v. Perry, 852 S.W.2d 578, 582 (Tex.App.–Dallas 1993, writ denied). An employee may be held individually liable for an employer's tortious acts if he knowingly participates in the conduct or has knowledge of the tortious conduct, either actual or constructive. Portlock, 852 S.W.2d at 582. Instigating, aiding, or abetting the wrongdoing constitutes participation. Permian Petroleum Co., 484 S.W.2d at 634. The employee or agent may be held liable regardless of whether he receives any personal benefit from the tortious act. Gardner Machinery Corp. v. U.C. Leasing, Inc., 561 S.W.2d 897, 899 (Tex.Civ.App.–Beaumont 1978, writ dism'd). The evidence shows that during the period from 1977 to 1978, Michael Cass had responsibility for most aspects of drilling and field operations. He then moved back to Dallas and helped his father run the business. The record contains material

transfer orders with Michael Cass's initials approving equipment transfers. Eldridge testified that Michael Cass initialed and approved many of the transfers of equipment from Stephens' wells to the Cass companion wells. From this evidence, the jury reasonably could infer that Michael Cass had knowledge of the transfers, that he participated in the conversions, and that he personally benefitted from the transfers. We conclude that there is both legally and factually sufficient evidence to support the findings of liability against Michael.

Third, Frank and Michael complain that the evidence is insufficient to support the jury's award of damages. The measure of the damages for conversion is the value of the property at the time and place of conversion. Prewitt v. Branham, 643 S.W.2d 122, 123 (Tex.1982)(per curiam); Edlund v. Bounds, 842 S.W.2d 710, 727 (Tex.App.–Dallas 1992, writ denied). The Casses argue that there is no competent evidence proving the market value of the converted property. Specifically, they contend: that Eldridge was not qualified to state an opinion as to the market value of the equipment; that he did not supply any information concerning the market value of the equipment; and that his damage calculations were based on erroneous facts.

The record reflects that the Casses have not preserved their complaints for our review. Although Michael and his father filed a motion to exclude Eldridge's testimony, the motion did not raise the three issues now asserted. To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex.1998). Without requiring a timely objection to the reliability of the scientific evidence, the

offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. Id. During the second day of trial, the trial court warned the Cass defendants that he could not rule on general complaints lodged against Eldridge's testimony. The trial court told them to object to the specific testimony they believed was unreliable. We also observe that the evidence concerning the market value of the equipment was presented over a number of days and Eldridge's entire report was admitted into evidence. If in fact there was an objection remotely close to the contentions raised here, it no doubt has been waived because the same evidence was presented elsewhere in the record without objection. Richardson v. Green, 677 S.W.2d 497, 501 (Tex.1984).

Assuming, arguendo, that the complaints had been preserved, the record contains evidence showing that Eldridge was qualified to give an opinion as to the market value of the equipment. For over twenty years, Eldridge has been closely associated with the financial operations of numerous oil and gas businesses. He has handled tax matters, accounting matters, and matters related to the drilling, completion, and operation of oil and gas wells. Specifically, he has accounted for both new and used equipment during his extensive career. Eldridge stated that he relied on the COPAS bulletins, the recognized authorities for oil and gas accounting, in determining the equipment values. Clearly Eldridge was qualified to state an opinion regarding the market value of the converted equipment.

In summary, we conclude there is both legally and factually sufficient evidence to support the jury's findings of conversion against Frank and Michael. There is also evidence to support the jury's award of damages. Accordingly, we overrule those portions of Frank's fourth point of error which challenge the sufficiency of the evidence to support the conversion finding

and the award of damages; we also overrule Michael's first, second and third points of error.

LIMITATIONS

The next issue for consideration regards the jury's fraudulent concealment and discovery rule findings. Fraudulent concealment is an affirmative defense to the statute of limitations. Weaver v. Wit, 561 S.W.2d 792, 793 (Tex.1977). It is based upon the doctrine of equitable estoppel. In the proper case, invocation of fraudulent concealment estops a defendant from relying on the statute of limitations as an affirmative defense to plaintiff's claim. Where a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence. See Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex.1983); see also, Computer Associates International Inc. v. Altai, Inc., 918 S.W.2d 453, 455-56 (Tex.1994). The plaintiff has the burden of coming forward with proof to support the allegation. Weaver, 561 S.W.2d at 793. In summary, the plaintiff must show: (1) existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception. Arabian Shield Development Co. v. Hunt, 808 S.W.2d 577, 584 (Tex.App.–Dallas 1991, writ denied). Fraudulent concealment applies to any cause of action, including breach of contract claims. Hurbrough v. Cain, 571 S.W.2d 216, 221 (Tex.Civ.App.–Tyler 1978, no writ)(Opin. on reh'g); Shipp v. O'Dowd, 454 S.W.2d 845, 847 (Tex.Civ.App.–Waco 1970, writ ref'd n.r.e.).

The discovery rule is not a plea of confession and avoidance, rather, it is a test to be applied in determining when a plaintiff's cause of action accrued. Weaver, 561 S.W.2d at 794. The rule applies as an exception to the statute of limitations when the injury is inherently undiscoverable and objectively verifiable. Computer Associates International, Inc., 918 S.W.2d at 456. The discovery rule exception defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action. Id. at 455, citing Trinity River Auth. v. URS Consultants, 889 S.W.2d 259, 262 (Tex.1994).

Fraudulent Concealment

Under the accounting procedures attached to the parties JOAs, Stephens had two years to bring a claim for a billing adjustment following the expiration of the calendar year in which the billing was made. Pursuant to this limitations period, Stephens first obtained jury findings that Frank had breached the operating agreements during the period from January 1, 1984, until the date suit was filed on November 4, 1986. The jury awarded Stephens $317,905.59 as damages for these breaches of the operating agreements. Next, Stephens obtained findings: that Frank fraudulently concealed the breach of contract claims; that the earliest date Stephens had knowledge of the concealment was March 1, 1986; and that the concealed breaches, outside of the two-year limitations period, were worth $268,256.58 in damages.

First, Frank asserts that there is no evidence or insufficient evidence to support the fraudulent concealment findings. We disagree. Eldridge identified seventeen categories of breaches of the operating agreements. These categories include overcharges for fixed rate overhead, field supervision fees, legal

fees, revenue distribution fees, contract operations, unauthorized expenditures, seven different overcharges for affiliate services, and other exceptions. In addition, there were numerous unauthorized charges for costs related to the Cass companion wells. Eldridge provided days of testimony explaining these items in detail, and he was cross-examined for at least six days of the trial.

Burt Nelson related that Frank was meticulous in nature, closely scrutinizing his books and records. Gregg Cass testified that his father reviewed the joint interest billings before they were sent out. There was evidence that Frank suspended many of the accounting procedures used by Stephens & Cass to document joint interest expenses. Eldridge explained that Frank kept a very detailed accounting of the expenditures for himself, but sent out a very condensed and abbreviated accounting to the joint interest owners. He stated that Stephens' version contained little information concerning the details of the expenditures. He explained that this procedure was highly unusual and irregular in the oil and gas business. Moreover, he opined that the procedure was implemented to keep Stephens from discovering the types of costs that were being billed to the joint accounts.

There was also evidence that Frank specifically tried to conceal his relationship with numerous affiliate companies. Eldridge recounted that he had seen stock books, stock registers, corporate minutes, minutes from organizational meetings, copies of check, and letters, which supported his conclusion

that companies such as General Water Haulers, Major Pipe, and Apple Cass were affiliates owned and controlled by the Casses.[4]

From this evidence, a rational jury could infer: that numerous breach of contract claims existed; that Frank Cass had knowledge of the claims; that he used deception to conceal the claims; and that Stephens relied on the deception when she paid her bills. We conclude that there is legally sufficient evidence to support the jury's fraudulent concealment findings. See Arabian Shield Development Co., 808 S.W.2d at 584.

Next, we consider whether the evidence is factually sufficient. Frank claims that Stephens failed to use diligence in detecting her cause of action. He claims that there can be no fraudulent concealment because she was authorized, under the JOAs, to review the company's records anytime she wanted. He claims that her failure to do so bars her claims. To support his position, Frank relies on his own testimony that General Stephens regularly discussed the joint interest bills with him and was very knowledgeable about them. He point to the the fact that General Stephens made a $225,000 prepayment of expenses in December of 1983, and argues that it shows the General agreed with his operating procedures. Finally, Frank points to testimony by Mrs. Stephens that he always gave her and the General every document they ever had requested, prior to the commencement of the lawsuit.

We conclude that the jury's finding is not so against the great weight and preponderance of the evidence as to be clearly

---

[4] The record does not include most of the exhibits relied upon by Eldridge. It seems the jury considered Plaintiff's Exhibits 1223 through 1243 in determining that Frank overcharged Stephens for expenses charged by affiliated companies.

wrong or manifestly unjust. Here, there is compelling evidence that Frank would not have disclosed any documents which established his misconduct had Stephens requested to see the records. The jury was aware that Frank had not disclosed all of the records to Gruy, and that he attempted to destroy evidence of his wrongdoing. The jury could rationally have inferred that Frank would not have disclosed any documents establishing his misconduct had Stephens requested the documents. Frank's testimony that the General regularly discussed the joint interest bills with him, and was knowledgeable about them, stands in strong contrast to the portrait of the General as weak, soporific, and unable to manage his financial affairs during the later years of his life. It was for the jury to resolve the conflicts in the evidence and to assess Frank's credibility. The fact that the General prepaid his expenses permits an inference that the General approved and trusted Frank's actions as operator. It does not, however, prove that the General was aware of Frank's breaches of the operating agreements, that he approved of them, or that he was in any way aware of Frank's misconduct. On the contrary, Stephens' evidence supports an inference that she would not have been able to detect many of the breaches of the operating agreements until after she recovered the trash documents. Finally, the fact that Frank gave Stephens all the documents she requested, prior to the lawsuit, does not prove that Frank did not conceal his breaches of the operating agreements. A review of the entire record demonstrates that Frank presented his theory to the jury, and that the jury rejected his position. The jury was the sole judge of the credibility of the witnesses, and it was their duty to resolve the conflicts in the evidence. Accordingly, we overrule Frank's factual sufficiency challenge.

Discovery Rule

Again, as discussed above, the jury found that Frank Cass committed common-law fraud in question number thirteen of the jury charge. The statute of limitations for fraud claims is four years. Tex.Civ.Prac & Rem.Code Ann. § 16.004 (Vernon Supp.2001). In question number fourteen, Stephens obtained a jury finding awarding her damages of $68,136.69 for the acts of fraud committed within the four-year limitations period. Next, she obtained findings that she could not have discovered the fraud before September 24, 1986, and that her damages for the acts of fraud committed outside the limitations period were $33,164.23. The findings that Frank and Michael converted jointly-owned equipment are similar to the fraud findings. Stephens first obtained findings that Frank and Michael converted $14,070,38 of equipment during the applicable two-year statute of limitations. Tex.Civ.Prac. & Rem.Code Ann. § 16.003. Next, she obtained findings that the conversion of equipment could not have been discovered before September 24, 1986, and that her damages for conversion outside the applicable limitations period was $84,710.44.

First, we address Frank's assertion that the discovery rule does not apply to breach of contract claims. The record clearly shows that the discovery rule findings were returned on the fraud and conversion claims. Fraudulent concealment was the theory used to extend Frank's liability beyond the limitations period set out in the JOAs. We therefore overrule this complaint.

Second, we address Frank's challenges to the sufficiency of the evidence to support the discovery rule findings on Stephens' fraud claims. Frank once again argues that Stephens failed to use reasonable diligence in ascertaining her causes of action

against him. He contends that Stephens could have requested the records and discovered his fraudulent behavior. He asserts that his misconduct was so obvious that it was inherently discoverable.

We have already concluded that there was legally and factually sufficient evidence to support the fraud findings against Frank. In finding fraud, the jury impliedly found that Frank knowingly made material misrepresentations on the joint interest bills intending that the joint owners rely on those misrepresentations. Texas courts have long adhered to the view that fraud vitiates whatever it touches, and have consistently held that a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations. See Borderlon, 661 S.W.2d at 908-09. To reward a wrongdoer for his own fraudulent contrivance would make the statute a means of encouraging rather than preventing fraud. Id.

Whether Stephens would have received the documents she needed to discover Frank's acts of fraud is debatable. Reasonable minds could differ about what the evidence shows. Here, the jury was aware of Frank's attempts to avoid detection by failing to disclose information on the joint interest billings, failing to disclose all documents to Gruy, and by his destruction of evidence. The jury was also offered testimony that the fraud was not readily discoverable from the joint interest bills. From this evidence, the jury rationally could have found that Frank's acts of fraud were not inherently discoverable. We conclude that there is legally and factually sufficient evidence to support the jury's findings.

Third, we consider Frank and Michael's assertion that the discovery rule does not apply to conversion claims. We

disagree. In Sunwest Bank of El Paso v. Basil Smith Engineering Co., Inc., we said that a cause of action for conversion ordinarily accrues on the date of conversion unless possession was initially lawful. 939 S.W.2d 671, 674 (Tex.App.–EL Paso 1996, writ denied). When possession is initially lawful, a cause of action for conversion accrues upon demand and refusal, or discovery of facts supporting the cause of action, whichever occurs first. Hofland, 834 S.W.2d at 414. Here, the possession was initially lawful and no demand was made before Stephens discovered her injury. Consequently, we overrule this complaint.

Fourth, we address Frank's challenge to the sufficiency of the evidence to support the discovery rule findings on Stephens' conversion claims. Frank asserts that the discovery rule is applicable because the facts show that the injury was inherently discoverable. Again, he asserts the fact that Stephens could have requested and audited the company records at anytime. In the present case, Frank and Michael had exclusive possession and control over the jointly- owned equipment. Stephens had no reason to know that the Casses had secretly transferred the equipment to the companion wells, or that they later sold the equipment to a third party. Many of the acts of conversion by Frank and Michael were only discovered after the Gruy audit was complete and the trash documents were recovered. We conclude that the injuries were not inherently discoverable, Hofland, 834 S.W.2d at 414, and that there is legally and factually sufficient evidence to support the jury's findings.

In summary, we conclude that the jury's fraudulent concealment and discovery rule findings are supported by legally and factually sufficient evidence. As a consequence, Stephens' claims are not restricted by the ordinary accrual dates under the relevant statutes of limitation for breach of contract, fraud, and

conversion. Accordingly, we overrule Frank's second and Michael's fourth points of error.

TORT OR CONTRACT

We now address Frank and Michael's complaint that Stephens is barred as a matter of law from tort recovery in this case because her claims only sound in contract. We have already concluded that there is sufficient evidence to support the jury's findings on Stephens' fraud and conversion claims. Now we address whether her tort claims are sufficiently independent from her breach of contract claim.

The law of "contorts" is a muddy area, devoid of bright rules or easy answers as to what conduct constitutes a tort, and what a breach of contract. The acts of a party may breach duties in tort or contract alone, or simultaneously in both. The Texas Supreme Court has observed that it is the nature of the injury which is most helpful in determining which duty or duties are breached. When the injury is only economic loss to the subject of a contract itself, the actions sounds in contract alone. Southwestern Bell Telephone Company v. DeLanney, 809 S.W.2d 493, 495 (Tex.1991); Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex.1986); Airborne Freight Corp., Inc. v. C.R. Lee Enterprises, Inc., 847 S.W.3d 289, 293 (Tex.App.–El Paso 1992, writ denied). Contract obligations arise from specific agreement between the parties. Tort obligations, in contrast, are those that are imposed by law-apart from and independent of promises made. DeLanney, 809 S.W.2d at 494; Airborne Freight Corp., Inc., 847 S.W.2d at 294.

Here, Stephens carefully delineated between the acts that were alleged to be breaches of contract, fraud, and conversion. She

designated the numerous categories of overcharges and the charges for expenses not authorized by the JOAs as breach of contract injuries. She designated the charges for expenses related to the Cass companion wells and the charges for property already owned by the joint owners as fraud injuries. She designated the removal of jointly- owned equipment to the Cass companion wells as conversion injuries.

Fraud

First, we consider whether Frank's conduct breached an obligation at law or in contract. In this case, the JOAs authorized Frank to bill the joint interest owners for certain expenses incurred in operating the jointly held leases. The agreements did not authorize Frank to bill the joint accounts for expenses incurred on the Cass companion wells, or to double-bill for equipment already owned by the joint accounts. We conclude that Frank breached a duty imposed by law when he fraudulently induced the joint interest owners to pay for goods and services they never received. Specifically, Frank induced the joint interest owners to pay for the goods and services by submitting bills that intentionally misrepresented that they were authorized by the agreements. Thus, they agreements created a conduit for committing the torts, but the duty breached exists independent from the agreements.

Second, we consider the nature of the injury. Here, the subject matter of the agreements is the operation of the jointly-owned wells. To the extent that Stephens was billed for goods and services that went to the Cass companion wells, her damages relate to charges that are independent of the JOAs. In addition, we reject the contention that Stephens' injury is contractual because she recovered economic damages. See Formosa Plastics Corp. U.S.A. v. Presidio Engineers & Contractors, Inc.,

960 S.W.2d 41, 47 (Tex.1998)(holding that tort damages are not precluded simply because the tort causes only economic loss). Frank's fraud caused the joint interest owners to pay for good and services they never received. Logically, their damages are economic– fraudulently induced payment of money results in money damages. We conclude that the injury is tortious in nature.

Conversion

First, we consider the obligation breached. Frank and Michael's unlawful appropriation of the jointly-owned equipment, for the use and benefit of their solely owned wells, breached an obligation that exists independent of the JOAs. Just as the unauthorized removal by a third party constitutes theft, the unauthorized appropriation of the jointly-owned equipment, here, constitutes conversion. The conduct breaches an obligation which exists outside the contract, and had nothing to do with the JOAs. As a consequence, we conclude that Frank and Michael breached a duty imposed by law.

Second, we consider the nature of the injury. Here the injury consists not only of the misappropriation of the equipment, but also the deception regarding the equipment transfers. The damages relate to the removal of the equipment to the Cass companion wells and, therefore, do not concern the subject matter of the JOAs–the Stephens' wells. Stated differently, the injury breaches Frank and Michael's legal duty to avoid converting the jointly-owned equipment, not just their contractual duty to honestly account for the movement of the equipment. We conclude that the injury is tortious in nature.

Having considered the obligations breached and the nature of the injuries, we conclude that Stephens' tort claims are

sufficiently independent from her contract claim. Accordingly, we overrule Frank's third point of error, and Michael's complaint contained within his second point of error.

OFFSET

We now address Frank's complaint that he is entitled to an offset for monies owed by Stephens. He contends that Stephens did not pay Cass Oil Company, Inc. for her share of the operating expenses. The record reflects that Stephens paid her share of the operating expenses into the registry of the trial court. Stephens testified that the amount paid into the registry was approximately $130,000. Stephens also said that she did not know what needed to be deducted from Eldridge's report, but was confident that Frank's counsel would let her know. Eldridge testified that he did not know whether Frank was entitled to an offset. He also stated the he did not know what amount of money was in the registry, whether the expense charges were legitimate, nor did he know what Stephens' balance was at the time the suit was filed.

The right to offset is an affirmative defense and the burden of pleading and proving the facts necessary to support offset are on the party making the assertion. See Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 936, (Tex.1980); Rauscher Pierce Refsnes, Inc. v. Great Southwest Sav., F.A., 923 S.W.2d 112, 117 (Tex.App.–Houston [14th Dist.] 1996, no writ). The elements necessary to prove a suit on a sworn account are: (1) a sale and delivery of goods or services; (2) the charges on account are just, i.e., prices are charged in accordance with agreement or, in absence of agreement, are usual, customary, and reasonable prices for that good or service; and (3) the amount remains unpaid. Tex.R.Civ.P. 185;

Andrews v. East Texas Medical Center–Athens, 885 S.W.2d 264, 266 (Tex.App.–Tyler 1994, no writ).

We conclude that Frank failed to prove his affirmative defense. It was not enough to prove that Stephens stopped paying the expenses and deposited the money in the registry of the trial court. Frank had to prove that the charges were legitimate and that he was entitled to the money deposited with the court. Frank did not introduce any invoices he claimed were unpaid. He did not file a verified pleading, or submit any evidence, proving the elements of his suit on a sworn account. Tex.R.Civ.P. 185; Andrews, 885 S.W.2d at 266. In addition, we point out that the jury specifically found that Stephens had not breached the operating agreements. Thus, we conclude that the jury impliedly found against Frank on his offset defense. Accordingly, this complaint is overruled.

ATTORNEY'S FEES

In his fifth point of error, Frank complains that there is no evidence or insufficient evidence to support the jury's award of $1.4 million in attorney's fees. He asserts that Stephens' attorney gave conflicting testimony regarding the fees incurred. In addition, Frank argues that the fees were not segregated by cause of action or by defendant. Finally, he contends that the attorney's are not rationally related to the amount in controversy.

As a general rule, the party seeking to recover attorney's fees carries the burden of proof. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex.1991); Aetna Cas. & Sur. v. Wild, 944 S.W.2d 37, 40 (Tex.App.–Amarillo 1999, writ denied). Factors that a fact finder should consider when determining the reasonableness of a fee include: (1) the time and labor required,

the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and the length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (Tex.1997).

First, we will address Frank's challenge to the sufficiency of the evidence. His challenge rests primarily on the fact that Stephens' attorney gave conflicting testimony about the amount of attorney's fees incurred. He also contends that the amount awarded includes fees for matters that are not related to Stephens' breach of contract claim

The record reflects that Stephens' attorney, Jad Davis, testified to the reasonable and necessary attorney's fees attributable to the breach of contract action. First, he testified to his own background, education, and experience. He then explained the eight factors for evaluating the reasonableness and necessity of attorney's fees. See Arthur Anderson & Co., 945 S.W.2d at 818. Davis made available a box of invoices and expense summaries supporting his testimony. Davis then identified the attorneys and legal assistants who worked on the case, and reviewed the work done.

Davis testified that $2,160,089.28 represented the reasonable and necessary attorney's fees and expenses "attributable to claims for which recovery of attorney's fees are allowed." He explained that the hourly rates charged to Stephens were actually below the rate he typically charged other clients. Later, Davis corrected his figure by subtracting the expenses for expert witnesses and investigators from the original amount. The new figure was $1,750,000. On cross-examination, Davis stated that the reduced figure represented the fees which were potentially recoverable. He explained that the $1,750,00 figure included $250,000 in fees that were not billed to Stephens, but could have been billed if he had charged her at his regular rate. Later Davis was recalled and testified that the $1,750,000 figure was attributable to the fees incurred on the breach contract claim only. During cross-examination, he stated that the fees incurred for the whole case were $3,000,000.

Frank's attorney, Greg Ackels, testified that the Casses had incurred reasonable and necessary attorney's fees of approximately $1,300,000 defending against all of the claims brought by Stephens. In addition, he stated that they had incurred expenses of $400,000. Ackels opined that the correct amount of Stephens' attorney's fees, attributable to her contract claim, was $200,000. He further stated that Stephens should not recover any attorney's fees because her claim was frivolous.

Obviously, the jury did not give full credit to Davis's testimony since they awarded Stephens 1.4 million instead of the requested $1.75 million. In addition, it should be equally self-evident that the jury rejected Ackel's testimony. Considering the entire record, we cannot agree that there is lack of evidence to support the jury's award. Davis testified at length about the work done on the case. He recounted the long discovery battle and the numerous hearings held to procure documents. He

opined that the defendants had engaged in a deliberate attempt to prevent Stephens from ever getting to trial. The jury was well aware that the case was eleven years old at the time of trial.

In addition, the procedural history of this case includes multiple mandamus actions, two appeals, weeks of discovery hearings, a twenty-one day hearing on the motion to suppress evidence and the motion for sanctions, a two day hearing on the motion to disqualify Eldridge, numerous pretrial motions, eight motions for summary judgment, four motions for the continuance by the Casses, and a nineteen day trial. The record literally weighs in favor of Stephens' position–with over 9,000 pages of reporter's record and over 3,000 pages of clerk's record–there is more than a scintilla of evidence to support Stephen's claim. Having considered the evidence in the light most favorable to the jury's verdict, we conclude that there is legally sufficient evidence to support the jury's award. Having considered all of the evidence, we conclude that there is factually sufficient evidence to support the jury's award. Accordingly we overrule Frank's sufficiency challenges.

We pause to respond to Frank's complaint that the award includes fees and expenses incurred on matters not related to Stephens' breach of contract claim. The record does not support Frank's position. First, the jury's award does not include fees for probating General Stephens' will. Davis testified that $83 was included for securing certified copies of the General Stephens' last will and testament. The copies were used to prove title during the trial. Second, the award does not include fees for litigation in Dallas County. Davis testified that he did not include any amounts for unrelated lawsuits. Specifically, Davis stated the fees for litigation in Dallas County were not included in the written summary of the fees requested by Stephens, and Ackels agreed. Third, the award

does not include fees for an alarm system or for wells and leases unrelated to this case. Davis testified that the requested fees did not include an amount for an alarm system and did not cover any unrelated wells or leases.

Davis's testimony is the only evidence concerning the fees included in Stephens' request. Frank has not brought forth any evidence that contradicts Davis's testimony. We conclude that Frank's complaints about unrelated fees are unfounded and lack merit. Frank presented his theory to the jury, and they rejected his argument. Under the facts and circumstances presented, we have no authority to interfere in the jury's resolution of the conflicts in the evidence or its assessment of the credibility of the witnesses. Accordingly, we overrule his complaints.

Next, we consider Frank's complaint that the fees were not segregated by cause of action or by defendant. When a party seeks to recover attorney's fees, he must show that the fees were incurred on a claim that allows recovery of such fees and, thus, is ordinarily required to segregate fees incurred on claims allowing recovery of fees from those that do not. Sterling, 822 S.W.2d at 10. The party must segregate fees by claim and by defendant when there are multiple defendants which may or may not be reasonable for the fees. Id. At 10-11. When the claims are "dependant upon the same set of facts or circumstances and thus are 'intertwined to the point of being inseparable,' the party suing for attorney's fees may recover the entire amount covering all claims." Sterling, 822 S.W.2d at 11; Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997).

Here, Davis testified that the request for attorney's fees related to Stephens' breach of contract claim only. In question number twenty-eight, the jury was asked to find the reasonable and

necessary attorney's fees attributable to Frank's failure to comply with the operating agreements. Logically, Frank would be the only defendant liable for the breach of the operating agreements since the jury found that he was the operator under those agreements. As a consequence, we conclude that the fees were appropriately segregated by claim and by defendant. Accordingly, we overrule Frank's complaint.

Finally, we address Frank's contention that the attorney's fees are excessive when compared to the amount in controversy. The jury found Frank liable for $586,162.17 in damages on Stephens' breach of contract claim. Frank argues that the amount of attorney's fees are more than twice the amount of damages and, thus, they are excessive. We disagree. Considering the facts and circumstances of this case, we conclude that the attorney's fees are reasonable and necessary. This case has been in litigation for fourteen years. The record is long and detailed. The discovery process was exhaustive and caused Stephens to spend large amounts just to obtain documents and information that support her claim. There is nothing simple about this case and the parties have fought over every point imaginable. We conclude that jury's award is not excessive. Consequently, we overrule Franks fifth point of error.

EXEMPLARY DAMAGES

During the punitive damage stage of trial, the jury awarded Stephens $5 million for Frank's fraudulent actions, $15 million for Frank's malicious conversion, and $20 million for Michael's malicious conversion. Stephens voluntarily remitted $2.5 million of the award for Frank's fraud, $12.5 million for Frank's malicious conversion, and $17.5 million for Michael's malicious conversion. On appeal Frank attacks the legal and

factual sufficiency of the evidence to support the jury's fraud finding. Frank and Michael also attack the sufficiency of the evidence to support the jury's malice findings. They also complain that the jury's awards were excessive. We will consider the sufficiency challenges and then the excessiveness complaints.

Sufficiency of the Evidence

First, Frank asserts that there can be no award of punitive damages without a finding that he intentionally committed fraud against Stephens. He argues that there is no evidence or insufficient evidence to support a finding that he intentionally committed fraud. See Sears, Roebuck & Co. v. Meadows, 877 S.W.2d 281, 282 (Tex.1994)(intent to defraud in a necessary element of a fraud claim); Bennet v. Howard, 141 Tex. 101, 170 S.W.2d 709, 712 (1943) (exemplary damages are recoverable for fraud). Because we have already determined that there is both legally and factually sufficient evidence to support the jury's finding of fraud against Frank, we overrule his complaint.

Second, Frank and Michael contend that there is no evidence or insufficient evidence to support the jury's findings that they maliciously converted Stephens' property. A party may recover exemplary damages with it proves that property was converted with malice. See George Thomas Homes, Inc. v. Southwest Tension Systems, Inc. 763 S.W.2d 797, 800 (Tex.App.–El Paso 1988, no writ). Malice may be shown by proof of either actual malice or implied malice. Id. Actual malice is characterized by ill-will, spite, evil motive, or purposing the injuring of another. Implied or legal malice, on the other hand, exists when wrongful conduct is intentional and without just cause or excuse. See Continental Coffee Products Co v. Cazarez, 937

S.W.2d 444, 452 (Tex.1996). Because this action was filed on November 4, 1986, we will not apply the heightened clear and convincing evidence standard when we review the factual sufficiency of the evidence to support the malice findings. See Moriel, 879 S.W.2d at 31-2 (declining to adopt clear and convincing evidence standard); Act of April 26, 1995, 74th Leg., R.S., ch.19, §§ 1-2, 1995 TEX.GEN.LAWS 108-113 (adopting clear and convincing evidence standard for cases filed on or after September 1, 1995; current version at Tex.Civ.Prac. & Rem. Code Ann. § 41.001(2), § 41.003 (Vernon 1997)). The standard for reviewing a legal sufficiency challenge remains unchanged whether we apply a heightened burden of proof or not. See In re B.R., 950 S.W.2d at 119.

The evidence clearly shows that Frank and Michael converted jointly-owned equipment for their own use and benefit. The evidence also shows that they converted the equipment with actual malice. First, there is the evidence that the Casses attempted to conceal their bad acts. Eldridge testified that the accounting procedures began to disintegrate after the General terminated his partnership with Frank. He also related that the Casses failed to provide the Gruy auditors with many of the documents which disclosed the unauthorized equipment transfers and the gross over billing of the joint accounts for equipment the joint owners already owned or for equipment they never received. The evidence shows that Frank attempted to destroy many of the documents that traced the equipment transfers and bogus charges by throwing them in the trash. Eldridge testified that without the documents, he would not have been able to reconstruct many of the transfers and charges. The trash documents included original copies of operating agreements, handwritten notes by Frank and Michael concerning the transfers and bogus charges, and invoices and transfer orders signed by both men. Second, there is the

evidence that Frank and Michael later sold their interests in the Cass companion wells to a third party for $12 million Third, there is the evidence that they generally resisted and attempted to delay trial of this case for approximately ten years.

The jury was free to infer malicious intent from the facts and circumstances presented. It was certainly reasonable for the jury to infer that the numerous: failures to give credit; the double billings for equipment already owned; and the billings for equipment and expenses never used by the joint interest owners, was not just fortuitous or accidental. The jury reasonable could have inferred that Frank and Michael deliberately and intentionally acted to benefit their own interests at the expense and detriment of the joint interest owners. As a consequence, we conclude that there is legally sufficient evidence to support the malice findings.

Next, we address Michael's complaint that Eldridge was not competent to give expert opinions regarding malice. He asserts that Eldridge's testimony is the only evidence supporting the malice findings. He argues that Eldridge's testimony was not supported by any evidence and that Eldridge was not qualified to give an opinion regarding whether the Casses defrauded, cheated, or stole from the joint interest owners. We disagree. First, Eldridge's testimony is not the only evidence supporting the malice findings. The record reflects that numerous documents were admitted into evidence, showing the transfer of equipment without credits and the bogus charges made to the joint accounts.[5] Second, the evidence clearly is the basis for

[5] Plaintiff's Exhibits 1202A-1202TTT and 1219A-C, are not a part of the record. These exhibits consist of many of the invoices, material transfer orders, and other documents which back Eldridge's conclusions.

Eldridge's report and his testimony. Third, Eldridge was clearly qualified to give an opinion regarding whether the Casses intentionally converted the joint interest owner's equipment. Eldridge was competent to opine about the accounting procedures employed, and the actual accountings made, by the Casses. He reviewed transfer orders signed by both Frank and Michael, the handwritten notes of both men, and was all aware of the role Michael played in the business. Eldridge's opinion that Frank and Michael intentionally defrauded, cheated and stole from the joint interest owners is supported by evidence and is certainly a reasonable inference to be drawn from the evidence presented. We overrule Michael's complaint.

Finally we address the factual sufficiency of the evidence. Frank relies on the evidence: that he sometimes paid vendors with his own money when the joint interest owners were late paying their bills; that he waited patiently for three years for the joint interest owners to elect a new operator; that he procured a new operator when the joint interest owners would not; and that the operating agreements authorized him to move the joint equipment between the jointly-owned wells. He argues this evidence proves his lack of malice. This evidence was presented to the jury and they impliedly rejected Frank's version of the events. Having considered all of the evidence, we conclude that the jury's verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Frank's complaint is overruled.

Michael relies on the evidence that the JOAs authorized the movement of the equipment. He also asserts the evidence shows that he was just following his father's orders was unaware of the accounting errors. Again, this evidence was presented to the jury and was rejected. There is evidence which

shows that Michael was intimately involved in the daily affairs of Cass Oil Company, Inc. For a period of time, he served as field supervisor. When he returned to Dallas, he was involved in allocating expenses between wells. His name appears on transfer orders and invoices. Considering all of the evidence, the jury was free to infer that Michael did more than just follow his father's orders. We again note that the operating agreements only authorized the operator to purchase jointly-owned equipment; there was no authorization for the equipment to be taken without compensation. We conclude that there is factually sufficient evidence to support the malice finding. Michael's complaint is overruled.

Excessiveness

Frank and Michael complain that the jury's awards are excessive under Texas and federal law. Specifically, they argue that the punitive damage awards are not rationally related to the actual damages. They assert that the awards are the product of passion and prejudice, and violate substantive due process protections against excessive punitive damage awards. We will address their state and federal complaints separately.

We review complaints regarding the excessiveness of a punitive damage award under a factual sufficiency standard of review. Pope v. Moore, 711 S.W.2d 622, 623-24 (Tex.1986). No set rule exists by which we determine whether the amount of exemplary damages was excessive. See Alamo National Bank v. Kraus, 616 S.W.2d 908, 910 (Tex.1981). Factors that are often considered are: (1) the nature of the wrong; (2) the character of the defendant's conduct; (3) the degree of the defendant's culpability; (4) the situation and sensibility of the parties; and (5) the extent to which the conduct offends the public sense of justice and propriety. Seminole Pipeline Co.,

Mapco, Inc. v. Broad Leaf Partners, Inc., 979 S.W.2d 730, 752-53 (Tex.App.–Houston [14th Dist.] 1998, no pet.). We may also consider: (1) the frequency of the wrongful conduct; (2) the size of an award needed to deter similar wrongs in the future; and (3) the financial ability of the defendant. Household Credit Services, Inc. v. Driscol, 989 S.W.2d 72, 93 (Tex.App.–El Paso 1998, pet. denied). The ratio between the amount of actual damages and exemplary damages will vary according to the facts of the particular case. See Kraus, 616 S.W.2d at 910. In reviewing the award, the court will determine whether, under the circumstances of the case, the award is reasonably proportional to the actual damages. Id. One of the major purposes of awarding punitive damages in Texas is to punish and deter the wrongful conduct of the party. See Moriel, 879 S.W.2d at 29. In reviewing a punitive damage award, we can only vacate or suggest a remittur if we find the punitive award is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. Id. at 30. A court of appeals confronted with a challenge to the factual sufficiency of an exemplary damages award must detail the relevant evidence explaining why the evidence supports or does not support the award in light of the Kraus factors. Moriel, 879 S.W.2d at 31.

Here, the ratios are approximately twenty-five to one. The jury assessed $101,309,92 against Frank as damages for his fraudulent conduct, and $98,780.82 against Frank and Michael jointly and severally as damages for their malicious conversion. After remittitur, the punitive damage awards are $2.5 million per defendant per each cause of action.

The evidence regarding the nature of the wrong and the character of the conduct involved has already been throughly discussed. Stephens presented evidence that Frank defrauded

the joint interest owners and converted their equipment for his own personal gain. The evidence also shows that Michael participated, aided, and abetted his father in defrauding the joint interest and converting their equipment. Culpability for these actions can lie nowhere but with Frank and Michael. Regarding the sensibilities of the parties concerned, Frank ran a corporation which handled $30 million of business during the two year Gruy audit period, whereas Stephens was a housewife unacquainted with the oil and gas business. Stephens produced evidence that General Stephens was unable to handle his financial affairs during the years after he terminated his partnership with Frank. Eldridge testified that the accounting procedures began to decline after the partnership terminated. He concluded that Frank and Michael had attempted to take advantage of the General and Mrs. Stephens by systematically inflating the joint interest billings, by making fraudulent expense charges, and by converting the jointly-owned equipment. Considering the last factor, we conclude that a jury could easily find the facts of this case to be substantially offensive to a public sense of justice and propriety. We conclude that an exemplary damage award of $2.5 million was not so against the great weight and preponderance of the evidence as to be manifestly unjust, and was supported by more than a scintilla of evidence.

We now address Frank's complaint that the jury disregarded relevant evidence regarding his financial ability. Frank testified that he had a negative net worth after the award of compensatory damages, and the he had never been accused of wrong-doing as an operator. Frank argues that jury disregarded this evidence during its deliberations. First, we point out that the jury did not find Frank to be a very credible witness. Perhaps it was the fact that Frank attempted to destroy relevant evidence, or perhaps it was his demeanor at trial. Regardless of

the reason why, the jury found Frank's testimony to be incredible and resolved almost every issue of disputed fact against him. Second, the record contains evidence that prior to the litigation, Frank handled over $30 million in business, that he owned interests in a number of affiliated companies, that he was a joint owner of a Lear jet, that he acted as a surety on a number of loans for his children, and that the companion wells were sold for $12 million. The jury had ample grounds to reject Frank's testimony.

In summary, we conclude that the award of punitive damages was not unreasonable, and was supported by competent evidence. Accordingly, we overrule Frank and Michael's state law complaints.

Due Process

The Due Process Clause "'prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor.'" See Owens Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 45 (Tex.1998), citing BMW of North America v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.E.2d 809 (1996). BMW marks the first time that the Supreme Court found a punitive damages award so excessive that it violated a party's substantive due process rights. See BMW, 517 U.S. at 585-86, 116 S.Ct. at 1603-04. Under BMW, even if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from "grossly excessive" punitive damages awards. See BMW, 517 U.S. at 568, 116 S.Ct. at 1595; see also, Gasperini v. Center of Humanities, Inc., 518 U.S. 415, 430 n. 12, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)(noting that BMW provides "'an ultimate federal constitutional check for exorbitancy'" of punitive damages).

BMW establishes three "guideposts" for determining whether a punitive damages award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's misconduct; (2) disparity between actual and punitive damages; and (3) a comparison of the punitive damages awarded and other civil or criminal penalties that could be imposed for similar misconduct. See BMW, 517 U.S. at 574-75, 116 S.Ct. at 1598-99, see also, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, 113 S.Ct 2711, 125 L.Ed.2d 366 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20-21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1990). We now apply these guideposts to determine whether the punitive damage judgment here is grossly excessive to the extent it violates Frank and Michael's substantive due process rights.

The evidence regarding the degree of reprehensibility of Frank and Michael's conduct has been discussed extensively throughout this opinion and under the first four factors enumerated in Kraus. Similarly, we have considered the ratio between the actual and exemplary damages awarded and concluded that they are not unreasonable under the facts and circumstances presented. Despite our analysis, BMW evidently requires a more stringent judicial review of the jury's verdict upon a contention that the ratio of exemplary to actual damages exceeds a constitutionally acceptable range. See Apache Corp. v. Moore, 960 S.W.2d 746, 749 (Tex.App.—Amarillo 1997, pet. denied)(applying BMW to reduce exemplary damages awards from rations of 185 to 1 and 92 to 1 to rations of 4 to 1).

The issue before us does not concern the power of the State of Texas to punish and deter fraudulent behavior of malicious conversion. BMW, 517 U.S. at 568-60, 116 S.Ct. at 1595-96. Nor, does it concern fair notice of the consequences of engaging in such behavior. BMW, 517 U.S. at 574-75, 116 S.Ct. at

1598-99. The question before us is whether the ratio, here, is constitutionally acceptable. This question does not have a clear answer. In BMW, the Supreme Court reversed an exemplary damage award that was 500 times the amount of the actual damages awarded. See BMW, 517 U.S. at 583, 116 S.Ct. at 1602. In TXO Prod. Corp., the Supreme Court indicated that an exemplary damage award of ten times the amount of actual damages was not unconstitutional. Id. at 462, 113 S.Ct. at 2722. In Haslip, the court held that an exemplary damage award of four times the amount of the actual damages did not cross the line into constitutional impropriety. Id. at 23-4, 111 S.CT. at 1046-47.

The Supreme Court has rejected a categorical approach to determining what ratios are grossly excessive. BMW, 517 U.S. at 582-83, 116 S.Ct. at 1602-03. It has said that there is no mathematical bright line that would fit every case. Id. at 583, 116 S.Ct. at 1602. The only guide in determining whether a party's substantive due process rights are violated seems to be a mandate that the award be reasonable and not shocking to our judicial sensibilites. Our understanding of BMW is that an award of exemplary damages will not violate a party's due process rights just because it is high in comparison to the award of actual damages, or because we would have decided the matter differently. Rather, the award must be so unreasonable and disproportionate that an appellate court can justly disregard the jury's verdict and conclude that the award is grossly excessive. Evidently, we will know such an award when we see it. BMW, 517 U.S. at 583, 116 S.Ct. at 1603 ("[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'").

Applying the "eyebrow test" to the facts at hand, we are not shocked by the ratios involved here. The facts found by the jury

show that Frank and Michael intentionally and deliberately defrauded and converted the property of the joint interest owners for their own personal benefit. Fraud and conversion are ancient wrongs which are roundly denounced and receive little public sympathy. Here, the facts are egregious and show a deliberate attempt by both men to escape responsibility for their wrongful conduct. Considering the reprehensibility of the conduct and the ratios together, we conclude that the jury's punitive awards are not unreasonable.

We now consider the last BMW factor, the sanctions for comparable misconduct. First, we observe that the criminal law punishes the theft of property, in the amounts converted here, as a third-degree felony. See Tex.Pen.Code Ann. § 31.03(e)(5)(Vernon Supp.2001)(theft of over $20,000 but under $100,000). In Texas, a third-degree felony is punishable by a jail sentence of not more than 10 years or less than 2 years and a possible fine of up to $10,000. See Tex.Pen.Code Ann. § 12.34 (Vernon 1994). Second, the numerous amendments to the Civil Practices and Remedies Code, which limit the amount of exemplary damages that may be recovered, are not applicable because this case was filed long before such amendments took effect. See Act of June 13, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex.Gen.Laws 44045, amended by Act of April 26, 1995, 74th Leg., R.S., ch. 19, §§ 41.001(2), § 41.003 (Vernon 1997)). We are not unmindful of the attempts by the legislature to curtail large awards of exemplary damages. However, the legislature has specifically decided that the statutory changes should not apply retroactively. This case was filed in November 1986 and has been through an odyssey of litigation. Considering the reprehensibility, the ratios, and the sanctions for comparable misconduct, we conclude that the exemplary damage awards are not unreasonable. Accordingly, we overrule Frank's third, and Michael's fifth, points of error.

SANCTIONS

In his sixth point of error, Frank complains that the trial court abused its discretion by imposing sanctions against him. The trial court awarded Stephens $978,492.10 as damages for Frank's discovery abuses. The trail court's judgment includes eighteen findings regarding the abuses by Frank and the justness of the trial court's award. On appeal, Frank complains that the award does not comport with the standards set by the Supreme Court. See TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex.1991); Braden v. Downey, 811 S.W.2d 922 (Tex.1991). Specifically, he argues that the award is unjust and excessive.

A trial court may impose sanctions on any party that abuses the discovery process. See Tex.R.Civ.P. 215. The discovery sanctions imposed by a trial court are within that court's discretion and will be set aside only if the court clearly abused its discretion. Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex.1986). The sanctions imposed must be just. Powell, 811 S.W.3d at 917. To determine whether an imposition of sanction is just, we consider whether: (1) there is a direct relationship between the offensive conduct and the sanction imposed; and (2) whether the sanction is excessive. Id. A trial court abuses its discretion if the sanction it imposes does not further one of the purposes that discovery sanctions were intended to further. Bodnow Corp., 721 S.W.2d at 840; Cap Rock Elec. Cooperative, Inc. v. Texas Utilities Elec.Co., 874 S.W.2d 92, 99-100 (Tex.App.–El Paso 1994, no writ).

Frank asserts that the trial court abused its discretion by awarding unjust and excessive sanctions, however, he has not attacked any of the trial court's findings of fact. The judge's findings of fact are reviewable for legal and factual sufficiency

of the evidence to support them, by the same standards which are applied in reviewing the legal or factual sufficiency of the evidence to support the jury findings. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex.1991); Cap Rock Elec.Cooperative, Inc., 874 S.W.2d at 97. By failing to attack the trial court's findings, Frank has waived any complaint regarding the sufficiency of the evidence to support those findings. Simon v. Watson, 539 S.W.2d 951, 959 (Tex.Civ.App.–Waco 1976, writ ref'd n.r.e.). Accepting the trial court's findings as true and correct, we now consider Frank's complaint.

The record contains over 4,000 pages of reporter's record dedicated to the numerous hearings on Stephens' motions for sanctions. Over the course of thirteen months, the trial court heard several weeks of testimony from more than eighty witnesses regarding Frank's discovery abuses. In its final judgment, the trial court specifically found that Frank: (1) abused the discovery process; (2) failed to comply with discovery requests; (3) violated the court's discovery orders; and (4) systematically destroyed relevant files and records. The court then noted that it has tested less stringent sanctions against Frank, and that less stringent sanctions would not be effective in this case. The court also found that Frank's discovery abuses created an onerous burden to the court, and that Frank exhibited flagrant bad faith and callous disregard for his responsibilities under the rules of procedure. The trial court's judgment shows that it considered both TransAmerican Natural Gas Corp. and Braden when it imposed the sanctions.

Frank contends that his conduct did not prejudice Stephens. First, he asserts that Stephens already had copies of the trash documents, and that the documents were produced to the Gruy auditors. We disagree. One, there is no proof that Stephens

had a copy of the documents that were thrown away. Two, Stephens put on evidence showing that the trash documents were not produced to Gruy. Next, Frank asserts that Stephens was not prejudiced because the General agreed that the records could be destroyed.[6] We disagree. First we point out that the trash documents were covered by a discovery order regardless of whether the General agreed to destroy an extra set of these documents. Second, we note that the operating agreements required the operator to maintain a copy of the joint account records. Thus, Frank had a duty as operator to maintain a copy of the records regarding the joint accounts regardless of the agreed destruction of the documents held in storage.

Finally, Frank complains that the sanctions create a double recovery because the award includes damages attributable to attorney's fees. We disagree. Mr. Davis testified that the reasonable and necessary attorney's fees for the whole case were $3 million. The jury awarded Stephens $1.4 million for the breach of contract claim alone. Considering the numerous motions, the numerous hearings on Stephens' discovery requests, the weeks of hearings on the motion for sanctions, and the appeal of the sanctions order, we conclude that the award of attorney's fees was just.

In summary, we conclude that the trial court did not abuse its discretion by imposing sanctions. The evidence shows that Frank failed to comply with Stephens' discovery requests, that he violated the court's discovery orders, and that he destroyed

---

[6] The record includes a letter signed by the General and Frank, wherein they authorized Security Archives, Inc., to destroy a number of boxes of documents which the company had in its possession. Frank testified that he and the General each had their own copies of the documents that were to be destroyed.

discoverable documents and records. The record also contains evidence that Stephens incurred considerable expenses in recovering the trash documents and in pursuing Frank's compliance with the rules of procedure. We conclude that the sanctions were just as both a punishment for Frank's bad faith conduct and as a future deterrent against such conduct. The sanctions were directly related to the offensive conduct and were not excessive considering the time, effort, and expense incurred by Stephens. Accordingly, we overrule Frank's sixth point of error.

CONCLUSION

In summary, we conclude that the trial court did not err by admitting Eldridge's testimony or by imposing sanctions, Further, we conclude that there is legally and factually sufficient evidence to support the jury findings. Having overruled each and every point of error raised by Frank and Michael, we affirm the judgment of the trial court.

THE SUPREME COURT OF TEXAS
Orders Pronounced March 21, 2002

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

01-0331

FRANK W. CASS v. PATRICIA LOVE STEPHENS, ET AL; from Reagan County; 8th district (08-97-00582-CV, RULE 47.7, 01-11-01)

2 petitions

THE SUPREME COURT OF TEXAS
Orders Pronounced October 24, 2002

ORDERS ON MOTIONS FOR REHEARING

THE MOTION FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

01-0331 FRANK W. CASS v. PATRICIA LOVE STEPHENS, ET AL.; from Reagan County; 8th district (08-97-00582-CV, RULE 47.7, 01-11-01)
[NOTE: Frank Cass's motion for rehearing was denied on September 26, 2002.]

(Justice Hankinson not sitting)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

FRANK W. CASS and MICHAEL L. CASS, Appellants,
v.
PATRICIA LOVE STEPHENS, Individually and as Trustee of the WALTER H. STEPHENS TRUST, the SSH TRUST, the SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and the HEATHER LOVE STEPHENS IRREVOCABLE TRUST, Appellees.

No. 08-97-00582-CV

Appeal from the 112th District Court of Reagan County, Texas, (TC#.371).

ORDER

The Appellant Frank W. Cass's motion for rehearing having been duly considered, and being of the opinion that the same should be overruled; It is ORDERED that said motion be and it is hereby overruled.

IT IS SO ORDERED THIS 7TH DAY OF MARCH, 2001.

DAVID WELLINGTON CHEW, Justice

En Banc
Barajas, C.J., Larsen, McClure, and Chew, JJ.

CHART

2001 UNPUBLISHED TEXAS COURTS OF APPEALS DECISIONS WHERE ONE OR MORE JUSTICES FILED A DISSENTING OPINION

(SOURCE – WESTLAW)

Midtexas Pipeline Co. v. Wright, 2001 WL 1636640 (Tex. App. – Texarkana 2001); *Lohmann v. Lohmann*, 2001 WL 1635971 (Tex. App. – El Paso 2001); *Kresge v. Mercado Latino, Inc.*, 2001 WL 1636841 (Tex. App. – Corpus Christi 2001); *State v. Reid*, 2001 WL 1515843 (Tex. App. – El Paso 2001); *Yazdani-Beioky v. Bhandara*, 2001 WL 1429414 (Tex. App. – Houston [14th Dist.] 2001); *Keith v. State*, 2001 WL 1441242 (Tex. App. – Beaumont 2001); *Jones v. Treon*, 2001 WL 1386408 (Tex. App. – Beaumont 2001); *In re Magers*, 2001 WL 1360300 (Tex. App. – Dallas 2001); *Smith v. State*, 2001 WL 1266058 (Tex. App. – Texarkana 2001); *Johnson v. State*, 2001 WL 1218412 (Tex. App. – Houston [14th Dist.] 2001); *Tucker v. City of Houston*, 2001 WL 1137614 (Tex. App. – Houston [1st Dist.] 2001); *Gulley v. State*, 2001 WL 1103248 (Tex. App. – Houston [14th Dist.] 2001); *Hoover v. Larkin*, 2001 WL 1046266 (Tex. App. – Houston [14th Dist.] 2001); *Bowles v. State*, 2001 WL 1047026 (Tex. App. – Houston [14th Dist.] 2001); *Walley v. State*, 2001 WL 1003311 (Tex. App. – Corpus Christi 2001); *Ives v. Lang*, 2001 WL 925735 (Tex. App. – El Paso 2001); *Cooper v. Balderas*, 2001 WL 925772 (Tex. App. – El Paso 2001); *Mason ex rel. Mansfield v. IHS Cedars Treatment Centerof Desoto Texas, Inc.*, 2001 WL 915215 (Tex. App. – Dallas 2001); *In re Smith*, 2001 WL 864399 (Tex. App. – Dallas 2001); *Graham v. Tyler Cty.*, 2001 WL 845345 (Tex. App. – Beaumont 2001); *Miles v. Ford Motor Co.*, 2001 WL 727355 (Tex. App. – Dallas 2001); *White*

v. State, 2001 WL 699634 (Tex. App. – Houston [14th Dist.] 2001); *Johnson v. State*, 2001 WL 665546 (Tex. App. – El Paso 2001); *Pecos Petroleum Co. v. Lewis Petro Properties, Inc.*, 2001 WL 651163 (Tex. App. – San Antonio 2001); *Neville v. Molina*, 2001 WL 619526 (Tex. App. – Houston [14th Dist.] 2001); *Tillman v. State*, 2001 WL 543666 (Tex. App. – Houston [14th Dist.] 2001); *Castillo v. Associated Bldg. Ser. Co.*, 2001 WL 487988 (Tex. App. – San Antonio 2001); *Loughridge v. Bishop*, 2001 WL 303556 (Tex. App. – Beaumont 2001); *Smith Protective Services, Inc. v. Fisher*, 2001 WL 423277 (Tex. App. – Dallas 2001); *Rivas v. State*, 2001 WL 333152 (Tex. App. – Houston [14th Dist.] 2001); *Torres v. State*, 2001 WL 276838 (Tex. App. – Houston [14th Dist.] 2001); *In re of D.A.B.*, 2001 WL 180977 (Tex. App. – Beaumont 2001); *Gomez v. State*, 2001 WL 168263 (Tex. App. – Amarillo 2001); *Wal-Mart Stores, Inc. v. Barrera*, 2001 WL 121176 (Tex. App. – San Antonio 2001); *Scheele v. Murk*, 2001 WL 99882 (Tex. App. – San Antonio 2001); *Malnar v. Mechell*, 2001 WL 62924 (Tex. App. – Beaumont 2001).

Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

No. 02-983

In the

Supreme Court of the United States

FRANK CASS,

Petitioner,

v.

PATRICIA LOVE STEPHENS, INDIVIDUALLY AND AS TRUSTEE OF THE WALTER H. STEPHENS TRUST, THE SSH TRUST, THE SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and THE HEATHER LOVE STEPHENS IRREVOCABLE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TURNER, DAVIS & GERALD
John A. "Jad" Davis (Counsel of Record)
Brandy R. Manning
Attorneys for Respondents, Patricia Love Stephens, et al.
400 W. Illinois, Suite 1400
Midland, TX 79701
(432) 687-0011

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

CONSTITUTIONAL AND STATUTORY PROVISIONS v

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 9

I. This Court has given adequate guidance to lower courts regarding the constitutionality of punitive damages awards. Because the Court of Appeals correctly stated and applied *Gore*, the petition should be denied. . . . 9

II. This Court has no jurisdiction over Cass's argument that Texas Rule of Appellate Procedure 47 violates due process; thus, Cass's petition should be denied. . . . 9

ARGUMENT 10

I. Under *BMW v. Gore*, the Texas Court of Appeals affirmed a punitive damages award that was not grossly excessive. 10

A. This Court has given more than adequate guidance with respect to excessive punitive damages 11

B. The Court of Appeals properly stated and applied this Court's decision in *BMW v. Gore* 16

C. The Texas Court of Appeals properly stated and applied this Court's punitive damages jurisprudence. 22

II. Cass's second issue, that Texas Rule of Appellate Procedure 47 denied him due process, is not justiciable. 23

A. Cass did not timely raise this issue. 23

B. To the extent Petitioner complains that unpublished opinions cannot be cited, his argument is moot 24

C. To the extent that Cass's complaint is the precedential value of unpublished opinions, Cass does not have standing 25

D. Petitioner's real complaint is that the Texas Supreme Court did not review this case 26

CONCLUSION AND PRAYER FOR RELIEF 29

TABLE OF AUTHORITIES

FEDERAL CASES

BMW v. Gore,
517 U.S. 559 (1996) 9-13, 15, 16, 22, 29

Flast v. Cohen,
392 U.S. 83 (1968). 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992). 25

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S.1 (1991) 11, 13-15

State Farm Mut. Ins. Co. v. Campbell,
No. 01-1289 (U.S. April 7, 2003) .. 10-13, 15, 22, 29

TXO Prod. Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993). 4, 10, 11, 13-15, 23

United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto,
477 U.S. 556 (1986). 24

TEXAS CASES

Cass v. Stephens,
2001 WL 28092 (Tex.App. - El Paso 2001, pet. denied). 4, 16-21

FEDERAL RULES

SUP. CT. R. 10 22

TEXAS STATUTES AND RULES

TEX. R. APP. P. 47 ..... 27, 29

TEX. R. APP. P 47.3(c) 23

TEX. R. APP. P. 47.3(d). 23

TEX. R. APP. P. 47.7 ..... 9, 23-26, 28

TEX. R. CIV. P. 315 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

Texas Rules of Appellate Procedure (Effective January 1, 2003):

47.4 Memorandum Opinions. If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:

> **(a)** establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
>
> **(b)** involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
>
> **(c)** criticizes existing law; or
>
> **(d)** resolves an apparent conflict of authority.

47.7 Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

Texas Rules of Appellate Procedure (Amended effective January 1, 2003):

47.3 Publication of Opinions.

(a) **The initial decision.** A majority of the justices who participate in considering a case must determine - before the opinion is handed down - whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.

(b) **Notation on Opinions.** A notation stating "publish" or "do not publish" must be made on each opinion.

(c) **Reconsideration of decision on whether to publish.** Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.

(d) **High-court order.** The Supreme Court or the Court of Criminal Appeals may, at

any time, order a court of appeals' opinion published.

47.4 Standards for Publication. An opinion should be published only if it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves a legal issue of continuing public interest;

(c) criticizes existing law; or

(d) resolves an apparent conflict of authority.

47.7 Unpublished Opinions. Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

STATEMENT OF THE CASE

This case is a textbook example of an abuse of the system. Filed on November 6, 1986, its long procedural history includes multiple mandamus actions,[1] interlocutory appeals,[2] weeks of discovery hearings,[3] a six-week sanction hearing which culminated in an award of sanctions,[4] a two-week hearing on a

---

[1]*Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-9000222-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00223-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-0105 in the Supreme Court of Texas (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-0106 in the Supreme Court of Texas (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00305-CV in the Court of Appeals for the Eighth District of Texas at El Paso (severance); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00296-CV in the Court of Appeals for the Eighth District of Texas at El Paso (severance); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00289-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00290-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-2107 in the Supreme Court of Texas (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-2108 in the Supreme Court of Texas (sanctions).

[2]Notice of Appeal (from Interlocutory Order Granting Temporary Injunction), 1987 TR 92-93.

[3]XVI:181.

[4]Order Imposing Sanctions, 1990 TR 749-54; CR:I:193-98; Memorandum Opinion, CR:I:190-92.

motion to exclude or suppress evidence,[5] numerous pretrial motions including a motion to disqualify plaintiffs' counsel,[6] a motion to disqualify plaintiffs' expert,[7] and eight motions for summary judgment.[8] Petitioner Frank W. Cass (Cass) changed attorneys and law firms three times.[9] Michael L. Cass[10] changed

---

[5]XVI:183.

[6]Defendant's Motion to Disqualify Attorneys of Record, 1990 TR 439-44.

[7]Defendant's Motion to Disqualify Plaintiffs' Expert Witness or Alternatively, To Disqualify Plaintiffs' Witness as a Sanction, CR:II:482-95.

[8]The Individual Defendants' Motion for Partial Summary Judgment and Supporting Brief, CR:II:372-461; Defendants' Motion for Summary Judgment as to Limitations, CR:II:462-78; Defendants' Supplemental Brief on Alter Ego Claim, CR:III:556-97; Defendants' Motion for Summary Judgment as to Issue of Unauthorized Expenditures, CR:III:716-28; Defendant's Motion for Summary Judgment on the Issues of Field Supervision Fees, Revenue Distribution Fees, and Ad Valorem Tax Services, CR:V:1604-16; Defendants' Motion for Summary Judgment on the Issue of Fixed Rate Overhead, CR:V:1620; Defendants' Motion for Summary Judgment on the Issue of Affiliate Vendor Overcharges, CR:V:1650-71; Defendants' Supplemental Motion for Summary Judgment as to Application of the Discovery Rule and the Doctrine of Fraudulent Concealment; CR:V:1672-1739; Defendants' Motion for Summary Judgment as to Exemplary Damages and Allegations of Tortious Injury, CR:V:1740-48; Defendants' Motion For Summary Judgment as to Limitations on Specific Charges, CR:V:1749-65.

[9]Designation of Additional Attorneys of Record, 1990 TR 306-308; Motion to Withdraw, CR:VI:2021-25; Order of Withdrawal, CR:VI:2026-27; Motion to Appear as Attorney of Record for Purpose of Continuance Only, CR:VI:203638; Notice of Entry of Appearance, CR:VI:2064-65.

[10]Michael is Cass's son. He was a defendant at trial and appealed, along with Cass, to the El Paso Court of Appeals and filed a petition for review, which the Texas Supreme Court denied. He has not petitioned for writ of certiorari in this Court.

attorneys four times.[11] Cass filed four Motions for Continuance.[12] Appellants sued Mrs. Stephens three times, her experts, her attorneys, and her investigators in other forums.[13]

Finally, the month-long jury trial began on May 28, 1997—almost eleven years after the case was filed. The jury found in favor of Mrs. Stephens on most of her affirmative claims and against Cass and his son, Mike Cass.[14] The Honorable Brock Jones entered his judgment on September 11, 1997.[15] Mrs. Stephens filed a written remittitur pursuant to Texas Rule of Civil Procedure Rule 315.[16] The Motions for JNOV, New Trial or in the alternative, Motion to Modify were overruled.[17]

---

[11]Designation of Additional Attorneys of Record, 1990 TR 306-308; Motion to Withdraw, CR:VI:2021-25; Order of Withdrawal, CR:VI:2026-27; Motion to Appear as Attorney of Record for Purpose of Continuance Only, CR:VI:2036-38; Notice of Entry of Appearance, CR: VI:2064-651; Defendant Michael L. Cass' Notice of Appeal, CR: VI:2269-70.

[12]Motion for Continuance, CR:II:364-71; Defendants' Second Motion for Continuance, CR:VI:2015-18; Defendants' Motion for Continuance, CR:VI:2029-35; Defendants' Motion for Continuance, CR:VI:2040-41; Defendants' Motion for Continuance, CR:VI:2051-57.

[13]XV:104, 153-154; XXVII:23-25, 77-78.

[14]Charge of the Court, CR:VI:2090-2129; Charge of the Court (Second Phase), CR:VI:2130-37.

[15]Final Judgment, CR:VI:2182-92.

[16]Written Remittitur, CR:VI:2264-66.

[17]Order Overruling Defendants' Motions for New Trial, CR:VI:2262-63. (This order specifically addresses the remittitur.)

As remitted, the judgment against Cass is for actual damages of $786,243.91, prejudgment interest of $919,154.47, attorneys' fees of $1,575,000.00 (contingent in part on appeals), court costs of $18,155.55, and punitive damages of $2.5 million (fraud) and $2.5 million (conversion).

Judge Jones also awarded $978,492.10 in sanctions against Cass for abuse of discovery.[18] Cass appealed, and the El Paso Court of Appeals affirmed the trial court in all respects.[19] Cass filed a motion for rehearing which was denied.- Cass then filed a petition for review in the Texas Supreme Court, which was denied. Cass then filed a motion for rehearing in the Texas Supreme Court, which was also denied. Finally, sixteen years after this case was initially filed, Cass has petitioned this Court for writ of certiorari.

STATEMENT OF FACTS[20]

Respondent Patricia Love Stephens ("Mrs. Stephens") is the widow of General Walter H. Stephens ("General Stephens"), a retired Brigadier General in the U.S. Marine Corps. Their two daughters, Heather and Sutton, are beneficiaries of the Respondent Trusts.

In the late 1960s, Mr. Cass and General Stephens formed a partnership to invest in oil and gas properties and successfully

---

[18]Final Judgment, CR:VI:21, 82.

[19]*Cass v. Stephens*, 2001 WL 28092 (Tex.App. - El Paso 2001, pet. denied).

[20]Because the jury found the facts in Mrs. Stephens' favor and the Court of Appeals affirmed those findings, it is appropriate for this Court to accept Mrs. Stephens' version of disputed facts. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447 (1993).

drilled numerous wells. XVIII:75; XVI:98-99. General Stephens and Mr. Cass were not only equal partners, but close friends. XXI:26. Their families attended dinner parties together, exchanged Christmas gifts, and "were just friends." XV:88.

In the mid-1970s, General Stephens' health declined considerably. He had multiple surgeries for a broken hip and a broken back that left him almost unable to walk. XV:74-78. He developed Pickwickian Syndrome, a medical condition that caused him to sleep up to twenty hours a day. XV:79-81. These illnesses and injuries left the General unable to meaningfully participate in his business. XV:74-84.

Due in part to Cass's desire to bring his son Michael L. Cass into the business, General Stephens and Cass terminated their partnership by a written "Agreement to Terminate" effective January 1, 1978. See XXII:13; PX 935. Contemporaneously, by formal written ballot election, Cass became the successor operator of all former Stephens & Cass properties, including the sixty-eight oil and gas wells involved in this suit (the "Stephens Wells"). XXI:143; VIII:48; PX 22. General Stephens retained his ownership interest in the wells and became a nonoperating working interest owner. XVI:108.

On November 14, 1983, Cass purchased certain undeveloped leasehold acreage from General Stephens. PX:122-130; XIII:142, 146, 150-153; XVI:24, 119; XX:31, 41. These undrilled "locations" were on the same leases as the Stephens Wells and were direct offsets to them. XVI:24. Cass then drilled his own wells on the offset locations ("Cass Companion Wells.") XIII:133.

Cass and his son immediately undertook a course of reprehensible conduct. Cass and his son took advantage of

General Stephens' vulnerability and poor health and of Mrs. Stephens' unfamiliarity with the business and her personal trust in Cass. The concept was simple. Costs attributable to drilling the Cass Companion Wells were charged to the Stephens wells, expenses attributable to the Cass Companion Wells were charged to the Stephens wells, revenue from the Stephens wells was shifted to the Cass Companion Wells, and equipment and materials from the Stephens wells were converted for use on the Cass Companion Wells without payment to Mrs. Stephens. VII:94; VI:160; XXIII:52-55; V1:160. The Cass Companion Wells were then sold for $12 million. XXIII:97.

None of this was an accident. Bert Nelson, who had officed with Cass, testified to the meticulous nature with which Cass kept his books and records, and that Cass knew all of the details of operations including costs and expenses incurred. XIII:8-13. Cass was a meticulous recordkeeper who had bragged of losing only one file in his business career. XIII:10. He reviewed the invoices and joint interest billings before they were sent out. XVII:39.

During this time neither General Stephens nor his wife had any reason to suspect what was occurring. General Stephens died on March 23, 1984, Mrs. Stephens' birthday. She faced a difficult task getting the estate's affairs in order. XV:70, 83-84. General Stephens had not filed an income tax return or paid property taxes for three years. XV:86. Years of invoices and uncashed checks had accumulated in his home. XV:83-84. He had, however, paid his friend Cass for joint interest bills on the Stephens wells. XV:87-88.

Prior to her husband's death, Mrs. Stephens had not been involved in the oil and gas business and had been a housewife and mother. XV:70. She had very little knowledge of the oil and

gas business. XV:86. Mrs. Stephens and her advisors requested information on the jointly-owned wells for the purpose of completing the estate tax return. XV:97-98. Cass withheld requested information. XV:100.

In March 1986, Cass sent Mrs. Stephens a letter proposing to shut in twenty-six wells. XV:98-99. She happened to see Bob Franklin, an engineer who had appraised the wells for estate tax purposes. *Id.* Based on his advice, Mrs. Stephens wrote a letter to Cass asking him to show her on a lease-by-lease basis how the leases would be held without production. *Id.* In response, Cass called Mrs. Stephens and "went off the deep end." *Id.* Over the course of the three-hour telephone conversation, he became first evasive and then insulting. XV: 100-101. Cass told Mrs. Stephens that she did not know what she was doing and neither did anyone working for her, including Mr. Franklin; that her CPA, Deana Cole, was a "dingaling"; and that her estate attorney, Robb Stewart, didn't know anything. XV:100.

Concerned that Cass was withholding information, Mrs. Stephens and her estate attorney hired a private investigator who recommended a "trash cover." XV:101, XV:10-13. The trash cover revealed that between 150,000 and 200,000 documents were systematically discarded over a period of twenty-five months, including documents which were the subject of pending discovery requests. Entire original files were thrown out, including the pump installation and development files. These files were essential to any effort to trace the movement of equipment. XV:54-56, XXIII:92, XV:56-57. Cass even discarded the only signed copy of the original Operating Agreement after the lawsuit was filed. VI:45-47. (The Operating Agreement is the document that establishes the core rights and obligations of the parties. VI:4.8.)

Mrs. Stephens also hired Gruy Petroleum Management Company ("Gruy") to conduct an audit of revenue and expenses for the jointly-owned wells. XV:101. Gruy produced two reports - a Revenue Audit Report (PX 18) and an Expenditure Audit Report (PX 19). Both reports indicated major discrepancies — the Expense Report showed a $2,900,000.00 discrepancy, and the Revenue Report showed a $9,000,000.00 shortage. *Id.*

After receiving the audit reports from Gruy in September 1986, Mrs. Stephens sent copies to the other working interest owners with a financial stake in the wells. XV:103-104. In response, Cass sued her for defamation.

At trial, Mrs. Stephens presented evidence of Cass's wrongful conduct primarily through her expert accountant, Harold Eldridge, who had worked continuously for eight months to complete his report. VIII: 113. The report meticulously detailed Cass's wrongful conduct. PX:1201A-1201E. Mr. Eldridge identified twenty-three categories of wrongful conduct; Volume 1 contains a section explaining each category. In addition, Mr. Eldridge prepared a section on each of the sixty-eight Stephens Wells with a summary for that particular well, a commentary describing the conduct, and backup documentation for his conclusions by well, as well as by month. His summary report consists of an opinion letter and five notebooks, identified as Exhibits PX 1201A-1201E respectively.

The jury found that Cass breached the Operating Agreements, found reasonable attorneys' fees for the breach of contract claims, found that Cass had committed fraud, found that Cass and Mike Cass had committed conversion, found that Cass had fraudulently concealed his breach of contract, found actual damages, and found punitive damages for fraud and conversion. The jury also answered discovery rule issues in Mrs. Stephens'

favor. The jury rejected Cass's defamation claim. The trial court also imposed discovery sanctions for egregious discovery abuse.

SUMMARY OF THE ARGUMENT

I. This Court has given adequate guidance to lower courts regarding the constitutionality of punitive damages awards. Because the Court of Appeals correctly stated and applied *Gore*, the petition should be denied.

The Texas Court of Appeals analyzed the punitive damages award in strict accordance with this Court's opinion in *BMW v. Gore*. Given the reprehensibility of Cass's conduct and the potential harm to Mrs. Stephens had the scheme continued undetected, the punitive damages award is not excessive. There is ample evidence to support the egregious nature of Cass's conduct, and Cass's assertion that the punitive damages award was based on misconduct not related to the subject matter of the litigation is pure speculation. Furthermore, the punitive damages award is less than one-half of the funds obtained from the sale of the Cass Companion Wells, which further supports its reasonableness.

II. This Court has no jurisdiction over Cass's argument that Texas Rule of Appellate Procedure 47.7 violates due process; thus, Cass's petition should be denied.

This Court has no jurisdiction over Cass's claim that the Texas Court of Appeals' decision not to publish its opinion violates his Constitutional rights. First, Cass failed to move for publication of the opinion as permitted under the Texas Rules of Appellate Procedure, so the issue is not properly before this Court. Second, Rule 47.7 was amended effective January 1,

2003; thus, to the extent Cass complains that unpublished opinions may not be cited, his claim is moot. Finally, because Cass cannot demonstrate that *he* was harmed by the fact that the Court of Appeals' opinion was unpublished, he does not have standing to raise the issue before this Court.

ARGUMENT

I. Under *BMW v. Gore*, the Texas Court of Appeals affirmed a punitive damages award that was not grossly excessive.

Cass asserts a violation of substantive due process. His claim is that the punitive damages awarded against him were "grossly excessive" under *BMW v. Gore*.

This Court has recognized that, in our judicial system, compensatory and punitive damages serve different purposes. *State Farm Mut. Ins. Co. v. Campbell*, No. 01-1289, slip op. at 5 (U.S. April 7, 2003). Compensatory damages are intended to make the plaintiff whole, while punitive damages "serve a broader function; they are aimed at deterrence and retribution." *Id.*

Because the need for deterrence and retribution will depend on numerous and sometimes intangible factors, a jury imposing a punitive damages award makes a qualitative assessment based on facts and circumstances unique to the case before it. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Because no two cases are even nearly identical, meaningful comparisons of punitive damages awards are difficult to make. *Id.* But because punitive damages awards are the result of the collective deliberation of jurors who swore to be impartial, were reviewed and upheld by the trial judge who

also heard the evidence, and were affirmed by at least one higher court, they are entitled to a "strong presumption of validity." *Id.* at 456-57.

A. This Court has given more than adequate guidance to state and lower federal courts with respect to excessive punitive damages awards.

Cass argues that this Court should grant his petition for writ of certiorari to "determine whether additional guidelines are needed to prevent state courts from approving awards that violate the due process clause." Cass's Pet. at p. i. But, in an effort to ensure to defendants the due process guarantees of the Fourteenth Amendment, this Court, on several occasions, has offered guidance for trial and appellate courts reviewing punitive damage awards. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *BMW v. Gore*, 517 U.S. 559, 575 (1996); *State Farm Mut. Ins. Co. v. Campbell*, No. 01-1289 (U.S. April 7, 2003). An evaluation of punitive damages awards does not lend itself to a formulaic or mathematical analysis—this Court has consistently recognized that each case is different, and that there are no absolutes. In fact, although *Gore* set forth specific guidelines for courts to consider, even *Gore* relied on the "eyebrow" test, recognizing that an evaluation of the reasonableness of a punitive damages award is much more art than science. *Gore*, 517 U.S. at 583 (referring to Justice O'Connor's dissent in *TXO* and noting that the ratio in *Gore* must surely "raise a suspicious judicial eyebrow.").

In *BMW v. Gore*, this Court set out factors that a court should consider when reviewing a punitive damages award. *Id.* This Court again addressed the application of these factors in

State Farm Mut. Ins. Co. v. Campbell, No. 01-1289 (U.S. April 7, 2003). The factors, with relevant comments as to their application, are as follows:

The degree of reprehensibility of the Defendant's misconduct: "The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, No. 01-1289, slip op. at 8 (citing *Gore*). This Court has instructed courts to evaluate the degree of reprehensibility of a defendant's conduct by considering whether the harm caused was physical or economic, whether the tortious conduct evidenced an indifference to or reckless disregard for the health and safety of others, whether the target of the conduct was vulnerable, whether the conduct involved repeated actions (versus an isolated incident), and whether the harm was the result of intentional malice, trickery, or deceit, or merely an accident. *Id.* The nature of the defendant's conduct is crucial; "trickery and deceit" are *per se* more reprehensible than negligence. *Gore*, 517 U.S. at 576.

This Court has held that a jury may not award punitive damages for conduct occurring in other states, especially when that conduct may be lawful in those states. *Gore*, 517 U.S. at 572; *Campbell*, No. 01-1289, slip op. at 9, 10. Furthermore, this Court recently cautioned states not to allow punitive damages to be based on conduct bearing no relation to the plaintiff's harm. *Campbell*, No. 01-1289, slip op. at 12. Dissimilar acts by the defendant, if they are independent of the acts upon which liability was based, may not be the basis for a punitive damages award. *Id.* And when evaluating a defendants' "recidivist" conduct, courts must ensure that the conduct in question replicates prior wrongful conduct. *Id.* at 12, 13 ("The reprehensibility guidepost does not permit courts to expand the

scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period."). In sum, punitive damages must be related to the harm caused only to the plaintiff and only by the defendant. *Id.* ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.").

The disparity between actual and punitive damages: In *Gore* and again in *Campbell*, this Court rejected a mathematical or "bright-line" approach to determining what ratio of punitive to actual damages was grossly excessive, *Gore*, 517 U.S. at 582-83; *Campbell*, No. 01-1289, slip op. at 14, although it stated that in practice, an appropriate punitive damages award will rarely be more than a single-digit multiple of a compensatory damages award. *Campbell*, No. 01-1289, slip op. at 14. In reiterating its reluctance to speak in terms of a "bright-line" constitutional limit, this Court noted that low compensatory awards might very well support a higher ratio if, for example, particularly egregious conduct resulted in only minimal economic damages, or when the injury is hard to detect or the monetary value of non-economic harm might have been difficult to establish. *Gore*, 517 U.S. at 582. It is also appropriate to consider the potential harm to plaintiff if the defendants' wrongful conduct would have continued or had a thwarted scheme succeeded. *TXO*, 509 U.S. 460; *Gore*, 517 U.S. 581.

A review of *Haslip*, *TXO*, *Gore*, and *Campbell* reveals that more egregious conduct supports a higher ratio. *See also Campbell*, No. 01-1289, slip op. at 15. In other words, the disparity between actual damages and punitive damages is not necessarily controlling where the defendant's conduct is

particularly egregious. *TXO*, 509 U.S. at 462. *TXO* held that a punitive damages award 526 times actual damages was not "grossly excessive" given the nature of the defendant's conduct. Justice Kennedy, writing for the plurality, concluded:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. This is particularly telling given that this Court suggested just two years earlier in *Haslip* that a ratio of four to one might be near the Constitutional line. *Haslip*, 499 U.S. at 23.

In *TXO*, this Court considered the potential gain to the defendant had its elaborate scheme succeeded, *TXO*, 509 U.S. at 461, although the gain was not quantifiable on the record in that case. This Court has also cited with approval the Alabama courts' punitive damages statute, which prescribes factors for appellate review of punitive damages awards; one of those factors is "the profitability to the defendant of the wrongful

conduct and the desirability of removing that profit and of having the defendant also sustain a loss." *Haslip*, 499 U.S. 1, 21-22.

It seems a logical extension of *TXO* and this Court's punitive damages jurisprudence that, where the benefit to defendant is quantifiable, that figure should also be considered when evaluating the reasonableness of a punitive damages award. A punitive damages award that is only a fraction of the profit pocketed by defendant as a result of his deceit may be appropriate, even where it is a larger multiple of compensatory damages. The purposes of a punitive damages award—punishment and retribution—would hardly be served if the defendant were allowed to retain the profit of his misconduct.

A comparison of the punitive damages awarded in other civil cases or criminal penalties that could be imposed for similar misconduct: The third *Gore* guidepost considers criminal penalties that could be imposed for the same or similar conduct, but only to the extent that the existence of criminal sanctions bears on the seriousness with which the state views the wrongful action. *Campbell*, No. 01-1289, slip op. at 18. The fact that imprisonment is available and likely to be imposed is significant. *Haslip*, 499 U.S. 1 at 23. The actual dollar amount of any potential fine is less instructive, however. *Id.*

A review of this Court's jurisprudence on punitive damages and due process illustrates that, short of a formulaic rule, this Court can offer no more "guidance" to lower courts. This Court has listed factors and clearly illustrated their application. What more can this Court do? Thus, unless this Court intends to establish a bright-line rule, there is no need to

offer further guidance to lower courts, and this petition need not be granted on that basis.

B. The Court of Appeals properly stated and applied this Court's decision in *BMW v. Gore.*

An analysis of the lower court's opinion in this case establishes that lower courts are properly applying the guidelines set forth by this Court. The Texas Court of Appeals in this case applied the *Gore* factors and held that the punitive damages award was reasonable. *Cass v. Stephens*, 2001 WL 28092, *31-33. There is ample evidence of reprehensibility, the most significant of the *Gore* factors, to support the punitive damages award in this case. Also, the punitive damages award is less than half of the funds obtained by the sale of the Cass Companions Wells, which further supports its reasonableness. The Court of Appeals analyzed this case as follows:

The degree of reprehensibility of the Defendant's misconduct: The Court of Appeals discussed the reprehensibility of Cass's conduct, which is the "most important" *Gore* factor, at length in its opinion. Cass orchestrated and carried out a deliberate pattern of deception on a vulnerable elderly woman, and the Court repeatedly emphasized the deliberate manner with which Cass defrauded and deceived her. Consider:

- Cass defrauded the joint interest owners and converted their equipment for his own personal gain, *Cass*, 2001 WL 28092 at *30;

- Cass converted jointly-owned equipment with actual malice—Cass actively tried to conceal his bad acts, Cass altered established accounting procedures to provide less

information to the working interest owners, Cass failed to provide the auditors with the documents disclosing unauthorized transfers and gross overbilling, and Cass attempted to destroy the documents tracing the fraudulent transfers and bogus charges by throwing them in the trash, *Id.* at 28;

- Cass kept a very detailed accounting of expenditures for himself, but sent out very condensed and abbreviated accountings to the joint interest owners, which contained very little information concerning the details of the expenditures, which was highly irregular in the oil and gas business; a witness testified that the procedure was implemented solely to keep Mrs. Stephens from discovering the types of costs for which she was being billed, *Id.* at *19;

- The Stephens' wells were billed and Mrs. Stephens paid for numerous goods and services, including ad valorem taxes, hauling, electricity, and road work, provided solely to the Cass companion wells, *Id.* at *13;

- Cass billed Mrs. Stephens for "operating expenses" for inactive wells, which she paid, *Id.*;

- Cass personally benefitted from these "misallocations," *Id.*;

- Cass personally altered and signed numerous delivery tickets and vendor's invoices to divert expenses from the Cass companion wells to the Stephens wells, which Mrs. Stephens paid, *Id.*;

- Jointly-owned equipment was systematically transferred from the Stephens wells to the Cass companion wells, with no credit given to Mrs. Stephens for the transfers, *Id.* at *14;

- Cass specifically tried to conceal his relationship with numerous affiliate companies not only from the joint interest owners who paid these companies for "services," but from the auditors hired to audit the joint interest billings, *Id.* at *19;

- Cass destroyed documents requested both by the auditors and by Mrs. Stephens in discovery requests[21], *Id.*;

- Cass ran a multi-million dollar corporation, while Mrs. Stephens was a housewife generally unfamiliar with the oil and gas business, who was working to settle the affairs of her husband's estate, *Id.* at *30;

- Cass took advantage of General Stephens during his illness and Mrs. Stephens by systematically inflating the

---

[21]Cass argues that this conduct is "not related to the subject matter of the litigation" and should not have been considered by the jury in awarding punitive damages. See Cass Pet. at 14-15. First, this conduct occurred both before and after suit was filed. After the suit was filed, such conduct might have been a discovery violation, but it was also the continuation of a pattern of fraud and deceit perpetrated by Cass and is thus relevant to the punitive damages inquiry. Second, there is no evidence that this conduct was considered by the jury in making the punitive damages award. Contrary to Cass's statement that the record is "bereft of clear evidence of any intent to defraud or of malicious conversion" Cass Pet. at p. 14, there is overwhelming evidence of intentional, fraudulent conduct to support the jury's award in this case. Finally, even if there was such evidence, Cass did not argue on appeal that such information should have been kept from the jury, nor did he challenge the punitive damages question and instructions on appeal, so this issue is not properly before this Court.

joint interest billings, making fraudulent expense charges, and converting the jointly-owned equipment, *Id.*;

- Cass deliberately and intentionally acted for his own benefit at the expense and detriment of the working interest owners, *Id.* at *28;

- Cass generally resisted and attempted to delay the trial of this matter for approximately ten years, *Id.*;

- Cass and his son committed a "pattern of abuses," including making the joint interest owners pay multiple times for the same property, discontinuing their procedures for documenting material transfers thereby making it harder to trace property transfers, destroying documents that evidenced the transfers, failing to give auditors the documents necessary to trace the transfers, and finally, selling the Cass companion wells, including the converted equipment, for $12,000,000.00, *Id.* at *16.

The Court noted that the jury could easily find the facts to be "substantially offensive" to a public sense of justice and propriety. *Id.* at *30.

Although the harm in this case was predominantly economic, Mrs. Stephens and her daughter also testified as to the toll the long years of litigation and the betrayal of trust by a close personal friend had taken. *Cass*, 2001 WL 28092 at *5. Cass's conduct clearly evidenced a disregard for the rights of others—he systematically lied, cheated, and stole from a vulnerable elderly woman who had placed her trust in him as her husband's former business partner and friend. Cass's conduct illustrated a pattern of deception—one that would likely have

continued had Mrs. Stephens not waged a sixteen-year battle to bring it to an end. And this case epitomizes intentional malice, trickery and deceit. Cass's was truly reprehensible conduct. As the Texas Court of Appeals stated:

> Frank (Cass) and Michael intentionally and deliberately defrauded and converted the property of the joint interest owners for their own personal benefit. Fraud and conversion are ancient wrongs which are roundly denounced and receive little public sympathy. Here, the facts are egregious and show a deliberate attempt by both men to escape responsibility for their wrongful conduct.

Cass, 2001 WL 28092 at *32.

The disparity between actual and punitive damages: The judgment awarded $786,243.91 actual damages against Cass: $586,162.17 for breach of contract, $101,300.92 for fraud, and $98,780.82 for conversion. As remitted, Mrs. Stephens was awarded punitive damages of $2.5 million for fraud and $2.5 million for conversion. The ratio of punitive damages to all actual damages is 6:1; the ratio of punitive damages to fraud damages is about 25:1, as is the ratio of punitive damages to conversion damages. Significantly, however, the total punitive damages awarded against Cass in this case—$5 million—is less than half of what was obtained from the sale of the Cass Companion Wells.[22]

---

[22]Cass and his sons jointly owned the Cass Companion Wells that were sold for $12 million. Michael testified that he got about $3.8 million. XXVII: 82-83. Presumably, Frank's other son also got a share. Cass and both of his sons were defendants at trial, and the jury awarded a total of $7.5 million in punitive damages

The Court of Appeals first noted that this Court has consistently rejected a categorical approach to determining what is a "grossly excessive" ratio. *Id.* at *32. It emphasized that this Court's mandate was that the award be "reasonable and not shocking to our judicial sensibilities." *Id.* The Court thoroughly reviewed the record and considered all of the evidence, both in support of and against the jury's verdict. Applying the "eyebrow" test, the court was not shocked by the ratios in this case. *Id.* The court emphasized Cass's intentional, fraudulent conduct and the fact that such conduct was for Cass's personal benefit. *Id.* The court noted that Cass's behavior was truly "egregious" and illustrated a deliberate attempt to escape responsibility for his wrongful actions. *Id.* at 32. The Court repeatedly noted that the Cass companion wells were sold for $12 million. *Id.* at *15, *28, *31.

A comparison of the punitive damages awarded in other civil cases or criminal penalties that could be imposed for similar misconduct: The Court of Appeals noted that Texas criminal law punishes theft of property in the amounts converted here as a third-degree felony. *Cass*, 2001 WL 28092 at *33. In Texas, such conduct is punishable by up to 10 years in jail and carries a minimum sentence of two years. *Id.* Given that Texas considers such conduct serious enough to be classified as a felony, a substantial punitive damages award is justified.

---

against all of the defendants. Thus, even if the total punitives are compared to the total received by all three men from the sale of the Cass Companion Wells, the punitive damages are only 63% of the sale price. This suggests that the award could have been significantly higher and still not eviscerated the defendants' gain from Cass's scheme.

Significantly, the Court of Appeals did not violate any of the other "rules" propounded by the Court. The Court of Appeals did not consider out-of-state conduct or conduct bearing no relation to Mrs. Stephens' harm. No dissimilar acts were considered (as in *Campbell*). The jury was dealing with a pattern of deceitful, fraudulent conduct perpetrated on an elderly woman who considered Cass a friend. The award was most likely driven by the jury's abhorrence of Cass's conduct and their desire to punish him and to deter similar conduct.

In sum, Mrs. Stephens was confronted with her husband's long illness, during which time he was unable to handle his financial affairs, and eventual death. Mrs. Stephens' husband had been partners with Cass, and she trusted him; the jury apparently believed that he took unfair advantage of her trust. Considering the evidence as a whole, and taking into account the jury's unwillingness to believe most of Cass's testimony, the Court of Appeals determined that the evidence regarding the degree of reprehensibility of Cass's conduct was overwhelming.

C. The Texas Court of Appeals properly stated and applied this Court's punitive damages jurisprudence.

The Texas Court of Appeals correctly stated and applied this Court's pronouncements regarding the constitutionality of punitive damages award. Cass argues that the Court of Appeals merely "claimed" to follow *Gore*, implying that even though the law was correctly stated, it was misapplied. But this Court rarely grants a writ of certiorari when the asserted error is the misapplication of a properly stated rule of law. SUP. CT. R. 10. Thus, this case does not merit review by this Court and Cass's Petition for Writ of Certiorari should be denied.

II. Cass's second issue, that Texas Rule of Appellate Procedure 47.7 violates due process, is not justiciable.

Cass argues that Texas Rule of Appellate Procedure 47.7, which affects the citability and precedential value of unpublished opinions, violates due process. He complains both that unpublished opinions cannot be cited, and that such opinions have no precedential value. Neither issue is properly before this Court. First, Cass failed to raise this issue in the Court of Appeals by moving for publication as permitted by the Texas Rules of Appellate Procedure. Second, to the extent Cass complains that unpublished opinions cannot be cited, his complaint is moot. Finally, to the extent he complains that unpublished opinions have no precedential value, Cass does not have standing to bring this issue before this Court.

A. Cass did not timely raise this issue.

The Court of Appeals released an unpublished opinion in this case, which Cass claims is a violation of his due process rights. But Cass never made a motion to publish the opinion, as permitted by the Texas Rules of Appellate Procedure. TEX.R.APP.P 47.3(c). Had the Court of Appeals denied a motion to publish, he could have then asked the Supreme Court to order the opinion to be published. TEX.R.APP.P. 47.3(d). Cass did neither. By failing to move for publication of the opinion in the Court of Appeals, Cass denied Texas courts the opportunity to review the constitutionality of a state statute. Because the issue was not raised in the courts below, this Court has no jurisdiction to review this issue. *TXO*, 509 U.S. at 463.

B. To the extent Petitioner complains that unpublished opinions cannot be cited, his argument is moot.

Cass complains that Texas Rule of Appellate Procedure 47.7 "prohibits the citation of unpublished opinions" and thus, violates due process. Effective January 1, 2003, however, Rule 47.7 was amended. It now allows the citation of unpublished opinions:

> Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but *may be cited* with the notation, "(not designated for publication)."

TEX. R. APP. P. 47.7 (emphasis supplied). The comment to the new rule now notes that it was "substantively changed to discontinue the use of the "do not publish," designation in civil cases, to require that all opinions of the courts of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. . . ." Comment, TEX. R. APP. P. 47. Even an opinion previously designated "do not publish" such as the one at issue in this case, may be cited. *Id.*

Thus, to the extent that Cass complains that unpublished opinions cannot be cited, his complaint is moot. *United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559-60 (1986) (holding that an amendment to a challenged statute rendered the case moot).

C. To the extent that Cass's complaint is the precedential value of unpublished opinions, Cass does not have standing.

Cass also complains that Rule 47.7's limitation on the precedential value of unpublished opinions is unconstitutional. But because he cannot show that failure to give precedential value to an unpublished opinion harmed him in any way, he does not have standing.

The "fundamental aspect" of standing is that it focuses not on the issue before the Court, but on the party asserting that issue. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). In other words, the standing inquiry asks whether the party seeking relief has alleged a personal stake in the resolution of the question, such that he is the proper party to ask this Court to adjudicate a particular issue. *Id.* Thus, the question is not whether this Court has jurisdiction to determine whether a state's rule regarding unpublished opinions is constitutional, but whether Cass has a real interest in that determination, so that he is the proper party to raise the issue.

This Court has identified three Constitutional standing requirements. First, the petitioner must establish that he has suffered an injury-in-fact—an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the challenged conduct; the injury must be "fairly traceable" to the conduct of which petitioner complains. *Id.* Finally, it must be likely, and not merely speculative, that a favorable decision will redress the petitioner's injury. *Id.* at 561.

To have standing with respect to the constitutionality of limiting the precedential value of unpublished opinions, Cass must allege that he was injured by his inability to rely on an unpublished opinion. Yet Cass cites to no unpublished opinion that, had he been permitted to cite, would have compelled a different result in the courts below. He has never argued that a prior unpublished opinion would have compelled a different result in his case, had it had precedential value. He simply claims that *his* case was unpublished and that future litigants will not be able to rely on it in their cases. A future litigant whose case turns on whether or not Cass's case has precedential value might have standing to make the argument Cass makes here, but Cass does not. He can show no injury caused by Rule 47.7; thus, he has no standing to raise this issue before this Court.

D. Petitioner's real complaint is that the Texas Supreme Court did not review this case.

Cass states in his Petition for Writ of Certiorari that "No citation rules also make it difficult, if not impossible, for a litigant like Cass to convince a higher court to review a Court of Appeals' unpublished decision." Cass Pet. at p. 25. Cass is convinced that, had the Court of Appeals' opinion been published, the Texas Supreme Court would have granted his petition for review, reversed the Court of Appeals on all grounds, and left him with a take-nothing judgment in his favor. See Cass's Motion for Rehearing in the Texas Supreme Court at pp. 2-3 ("if the opinion was published, Mr. Cass is convinced that this Court would readily grant the Petition....The fact that the opinion is unpublished allows [the El Paso Court] to insulate themselves from this Court's review...given this Court's propensity not to grant petitions for review in cases where the appellate opinion is unpublished.").

Cass's argument that the Texas Supreme Court did not review his case because the opinion was unpublished is pure speculation and presupposes that the Court did not discharge its duties. Cass argues that he could not establish jurisdiction because the opinion was unpublished. First, jurisdiction is not dependent on publication. The Texas Supreme Court denied the petition outright—it did not dismiss it for want of jurisdiction. Jurisdiction is merely a prerequisite to granting a petition for review. It does not follow that the Court *will* grant the petition if it has jurisdiction, only that it may. Stated differently, the Texas Supreme Court is not obligated to take a case just because it has jurisdiction. So whether the fact that the opinion was unpublished affected the Court's jurisdictional analysis (and there is no indication that it could have), the fact that the opinion was unpublished did not necessarily impact the Court's decision not to review the case.

Cass argues that an unpublished opinion, because it has no precedential value, is *per se* not important to the jurisprudence of the state, so that the Texas Supreme Court is not likely to review it. But Cass has it exactly backwards. It is not that the opinion in his case was not important because it was unpublished; rather, the opinion was unpublished because it was not important to the jurisprudence of the state. This case raised no new issues that would have compelled its publication under the Texas Rules and that might have made the Texas Supreme Court more likely to exercise its discretion and grant review. If the lowers courts properly apply Rule 47, few, if any, unpublished opinions will merit review simply because the issues in those cases are so well-settled.

Cass may be arguing that the Texas courts somehow "conspired" to deny him adequate review. He states that the El Paso court violated Rule 47 by making this an unpublished

opinion, apparently in an effort to shield itself from higher court review. See Cass's Motion for Rehearing at p. 1. He also infers that the Texas Supreme Court denied his petition because it was unpublished, without regard for the Court's duty to consider the significance of each case. *Id* at 1-2. ("By allowing the El Paso Court to rewrite Texas state law on multiple occasions in a 65-page opinion, and then not publish that opinion, thereby giving it no precedential value for future litigants, this Court has put its stamp of approval on an abuse of power by the El Paso Court and has allowed Texas Rule of Appellate Procedure 47.7 to serve as a basis for courts of appeals to circumvent this Court's review of their blatantly erroneous decisions...this Court should recognize its duty to correct the injustice and grant the Petition."). If that is what Cass is asserting, this Court should be careful not to assume the role of ensuring that state court justices properly carry out their judicial duties. This Court should presume that the Texas courts followed the statutes which govern their decisions with respect to publication and review, particularly when there is no indication that either the El Paso Court of Appeals or the Texas Supreme Court did anything other than effectively carry out their duties under the law.

In conclusion, this Court does not have jurisdiction to consider whether the inability to cite and/or rely on unpublished opinions violates due process. And this Court should be wary of considering the issue Cass really asserts—that Texas courts blatantly violate the rules and manipulate litigants to defeat the ends of justice. That is simply not the case. The Texas Supreme Court, just like this Court, has discretionary review. Like this Court, the Texas Supreme Court must prioritize cases and deal with those it believes are the most significant to Texas jurisprudence. That is precisely what it did in this case.

CONCLUSION AND PRAYER FOR RELIEF

The Texas Court of Appeals properly analyzed the punitive damages award under this Court's punitive damages jurisprudence including *Gore, Campbell,* and related cases. Under that analysis, the punitive damages award is reasonably proportional and does not violate Cass's substantive due process rights. This case is not one where state courts approved a punitive damages award that was "out of bounds."

Cass's second issue, which concerns "no publication" rules, is not properly before this Court. Cass did not raise the issue in the courts below. To the extent Cass complains that Rule 47 prohibits citation of unpublished opinions, his argument is moot. To the extent he complains that Rule 47 precludes the precedential value of unpublished opinions, he does not have standing to bring the issue before the Court. This Court should take care to ensure it does not "police" state courts to ensure that they are properly fulfilling their duties under state law.

For these reasons, Mrs. Stephens prays that this Court deny Cass's petition for writ of certiorari.

Respectfully submitted,

TURNER, DAVIS & GERALD
A Professional Corporation
400 W. Illinois, Suite 1400
Midland, Texas 79701
(432) 687-0011
(432) 687-1735 (Fax)

By:_____
John A. "Jad" Davis
State Bar No. 05511400
Brandy Manning
State Bar No. 24029703

ATTORNEYS FOR RESPONDENTS

No. 02-983

MAY 2 2003

In the

Supreme Court of the United States

FRANK CASS,
Petitioner,

v.

PATRICIA LOVE STEPHENS,
INDIVIDUALLY AND AS TRUSTEE OF
THE WALTER H. STEPHENS TRUST,
THE SSH TRUST, THE SUTTON
ELIZABETH STEPHENS IRREVOCABLE TRUST,
and THE HEATHER LOVE STEPHENS
IRREVOCABLE TRUST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS SUPREME COURT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ACKELS & ACKELS, L.L.P.
HENRY J. ACKELS
LAWRENCE E. ACKELS, JR.
GREGORY K. ACKELS
2777 Stemmons Freeway, Suite 879
Dallas, TX 75207
(214) 267-8600
(214) 267-8605 (Fax)
Attorneys for Petitioner Frank Cass

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

POINT I THE PETITION SHOULD BE GRANTED, THE JUDGMENT VACATED, AND THE CASE REMANDED TO THE TEXAS COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *STATE FARM V. CAMPBELL* BECAUSE THE RATIO BETWEEN PUNITIVE DAMAGES AND ACTUAL DAMAGES IS 25 TO 1, AND THE TEXAS COURT OF APPEALS DID NOT APPLY ALL THE PRINCIPLES ESTABLISHED IN *CAMPBELL*. 2

A. The Texas Court of Appeals Approved a Punitive Damages Award That is 25 Times the Actual Tort Damages Awarded, and This Court, in *Campbell*, Made it Clear That Where the Ratio Exceeds a Single Digit, Due Process Concerns are Rarely Satisfied. 3

B. This Court has Recently Remanded a Number of Similar Cases for Reconsideration in Light of *Campbell*. 5

C. The Petition Should be Granted Because the Texas Court of Appeals did not Conduct a *De Novo* Review of the Trial Court's Punitive Damages Award. 6

D. The Petition Should be Granted Because the Texas Court of Appeals Impermissibly

Considered Cass's Financial Condition in Reviewing the Punitive Damages Award. 7

E. The Petition Should be Granted to Address Whether, in the Wake of *Campbell,* a Jury May Consider Alleged Misconduct by a Defendant Unrelated to the Subject Matter of the Plaintiff's Claims in Assessing Damages. 8

POINT II THE PETITION SHOULD BE GRANTED BECAUSE CASS HAS STANDING TO RAISE THE ISSUE OF WHETHER RULES PROHIBITING CITATION OF APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS, AND THE ISSUE IS JUSTICIABLE. 8

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Anastasoff v. United States,
223 F.3d 898 (8th Cir. 2000), *vacated as moot*,
235 F.2d 1054 (8th Cir. 2000) 9

Anchor Hocking, Inc. v. Waddill,
2003 WL 1903723 (U.S. April 21, 2003) 5

BMW of North America v. Gore,
517 U.S. 559 (1996) 3, 4

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 6

DeKalb Genetics Corp. v. Bayer Cropscience, S.A.,
2003 WL 1903721 (U.S. April 21, 2003) 5

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001) 9

Key Pharmaceuticals, Inc. v. Edwards,
2003 WL 1903722 (U.S. April 21, 2003) 5

National Union Fire Ins. Co. v. Textron Financial Corp.,
2003 WL 1903724 (U.S. April 21, 2003) 5

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.,
272 F.3d 1335 (Fed. Cir. 2002), *vacated sub nom, DeKalb Genetics Corp. v. Bayer Cropscience, S.A.*,
2003 WL 1903721 (U.S. April 21, 2003) 5

San Paolo U.S. Holding Co., Inc. v. Simon,
2003 WL 1903720 (U.S. April 21, 2003) 6

State Farm Mutual Automobile Insurance Co. v. Campbell,
123 S. Ct. 1513 (2003) 1, 2, 3, 4, 5, 6, 7, 8, 10

STATE CASES

Amoco Production Co. v. Alexander,
622 S.W.2d 563 (Tex. 1981) 3

Bocci v. Key Pharmaceuticals, Inc.,
35 P.3d 1106 (Or. App. 2001), *vacated sub nom Key Pharmaceuticals, Inc. v. Edwards*,
2003 WL 1903722 (U.S. April 21, 2003) 5

Simon v. San Paolo U.S. Holding Co., Inc.,
2001 WL 1380836 (Cal. App. 2001), *vacated*,
2003 WL 1903720 (U.S. April 21, 2003) 6

Textron Financial Corp. v. National Union Fire Ins. Co.,
2002 WL 1399105, 1 (Cal. App. 2002), *vacated*,
2003 WL 1903724 (U.S. April 21, 2003) 5

Twin City Fire Insurance Co. v. Davis,
904 S.W.2d 663 (Tex. 1995) 3

Waddill v. Anchor Hocking, Inc.,
27 P.3d 1092 (Ore. App. 2001), *vacated*,
2003 WL 1903723 (U.S. April 21, 2003) 6

STATUTES AND RULES

Tex. Gov't Code § 22.001(a) 10

Tex. R. App. P. 47.7 (effective January 1, 2003) 9

PRELIMINARY STATEMENT

This reply is necessary to address new issues raised by this Court's decision in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), as well as new issues raised by the Respondents in their Brief in Opposition to Petition for Writ of Certiorari. In his Petition, Petitioner Frank Cass ("Cass") asked this Court to grant the Petition so that the Court could provide additional guidance to lower courts reviewing punitive damages awards under the Due Process Clause. This Court recently provided that guidance in *Campbell*. Contrary to Respondents' assertions, the *Campbell* decision demonstrates that the Texas Court of Appeals did not correctly analyze whether the punitive damages award violated Cass's due process rights.

In *Campbell,* this Court made it clear that in most cases, where the ratio between punitive damages and actual damages exceeds a single digit, the requirements of due process will not be satisfied. Here, as the Texas Court of Appeals acknowledged, the ratio between punitive damages and actual damages was 25 to 1. In the *Campbell* decision, this Court also clarified its earlier rulings and determined that a punitive damages award must be reviewed *de novo* by an appellate court. The Texas Court of Appeals gave deference to the trial court's award and did not state that it was applying a *de novo* standard of review. Under *Campbell,* a court may not consider the defendant's financial condition when testing the constitutionality of an award. As Respondents point out, however, the Texas Court of Appeals did consider Cass's financial condition in analyzing whether the punitive damages award was excessive.

Since *Campbell*, this Court has granted five petitions for certiorari and remanded those cases for reconsideration of the punitive damages awards. Given the 25 to 1 ratio of punitive to actual damages, the Texas Court of Appeals' failure to clearly apply a *de novo* standard of review, and the effect of Cass's alleged wealth on the analysis of the award, this Court should similarly grant the Petition, vacate the judgment, and remand this case to the Texas Court of Appeals.

Respondents are also incorrect in asserting that Cass's arguments regarding the Texas no-publication and no-citation rules are not justiciable. The adoption of new rules of procedure by the Texas Supreme Court does not affect Cass's ability to raise the issue. Because Cass personally has been adversely affected by the rules and he asked the Texas Court of Appeals to publish its decision, there is no question that he has standing to raise the constitutionality of the no-publication and no-citation rules.

POINT I THE PETITION SHOULD BE GRANTED, THE JUDGMENT VACATED, AND THE CASE REMANDED TO THE TEXAS COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *STATE FARM V. CAMPBELL* BECAUSE THE RATIO BETWEEN PUNITIVE DAMAGES AND ACTUAL DAMAGES IS 25 TO 1, AND THE TEXAS COURT OF APPEALS DID NOT APPLY ALL THE PRINCIPLES ESTABLISHED IN *CAMPBELL*.

Contrary to Respondents' assertion, the Texas Court of Appeals' decision cannot be reconciled with this Court's recent decision in *Campbell*. While the Texas Court of Appeals approved a 25 to 1 ratio of punitive to actual damages, saying the ratio was not shocking, in *Campbell*,

this Court stated that any ratio exceeding a single digit is suspect. This Court has recently remanded a number of cases for reconsideration in light of *Campbell*, including four cases where the ratio was less than the 25 to 1 ratio here. The Texas Court of Appeals also failed to clearly apply a *de novo* standard as articulated in *Campbell* and took Cass's financial condition into consideration in analyzing whether the punitive damages award was excessive. The jury's consideration of Cass's alleged litigation-related misconduct should also be reviewed in light of the prohibition in *Campbell* against taking into account dissimilar acts.

A. The Texas Court of Appeals Approved a Punitive Damages Award That is 25 Times the Actual Tort Damages Awarded, and This Court, in *Campbell*, Made it Clear That Where the Ratio Exceeds a Single Digit, Due Process Concerns are Rarely Satisfied.

The Petition should be granted because, in the wake of *Campbell*, the Texas Court of Appeals' approval of a 25 to 1 ratio of punitive to actual damages does not satisfy the requirements of the Due Process Clause. The jury awarded approximately $200,000 in actual tort damages against Cass and, after remittutur, the punitive damages award was $5 million. (App. A55-56.) As the Texas Court of Appeals stated, the ratio of punitive to actual damages, after remittitur, is approximately 25 to 1.[1] (App. A55.) In

---

[1]Respondents attempt to mislead this Court by asserting that the ratio of punitive damages to actual damages is 6 to 1. (Opposition at 20.) This calculation includes actual damages for breach of contract, a cause of action for which punitive damages are unavailable in Texas. *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981). Under Texas law, for a party to recover punitive damages, there must

reviewing the judgment, the Texas Court of Appeals referenced the three "guideposts" established in *BMW of North America v. Gore*, 517 U.S. 559 (1996). With respect to the second guidepost, the disparity between actual and punitive damages, the Texas Court of Appeals applied what it called an "eyebrow test" to the punitive damages and stated that the court "was not shocked by" the 25 to 1 ratio. (App. A60.) The test used by the Texas Court of Appeals is not acceptable in the wake of *Campbell*.

In *Campbell*, this Court noted that when the ratio between punitive and actual damages exceeds a single digit, the punitive damages award is definitely suspect. Acknowledging that there is no particular bright-line test for determining whether a ratio is or is not acceptable, this Court stated that "our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 123 S. Ct. 1513. The 25 to 1 ratio in this case is clearly questionable under *Campbell*.

Respondents assert that the punitive damages award is entirely justified by Cass's alleged egregious conduct and claim, as the Texas Court of Appeals did, that the ratio is appropriate based on such conduct. (Opposition at 20-21; App. A60.) In *Campbell*, this Court noted that ratios exceeding single digits might comport with due process where "a particularly egregious act has resulted in only a

---

be a finding of an independent tort with accompanying actual damages. *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995). The Texas Court of Appeals acknowledged that the relevant ratio was 25 to 1 based on the actual tort damages awarded. (App. A55.)

small amount of economic damage." *Id., quoting Gore,* 517 U.S. at 582. If, however, "compensatory damages are substantial," due process may only be satisfied by a lesser ratio, "perhaps only equal to compensatory damages." *Id.* Here, Respondents were awarded more than $200,000 in actual tort damages. (App. A55-56.) In such a situation, "it should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell*, 123 S. Ct. 1513, *citing Gore*, 517 U.S. at 575. When relying on Cass's alleged egregious conduct, the Texas Court of Appeals did not take into account the large amount of actual damages awarded or whether Cass's conduct is "so reprehensible" that it justified a departure from the norm.

B. This Court has Recently Remanded a Number of Similar Cases for Reconsideration in Light of *Campbell.*

As of the time this Reply was prepared, since issuing the *Campbell* decision, this Court has issued five orders granting petitions for certiorari, vacating the judgments, and remanding to the lower court for further consideration in light of *Campbell. See DeKalb Genetics Corp. v. Bayer Cropscience, S.A.*, 2003 WL 1903721 (U.S. April 21, 2003) (3 and 1/3 to 1 ratio of punitive damages to actual damages[2]); *Key Pharmaceuticals, Inc. v. Edwards*, 2003 WL 1903722 (U.S. April 21, 2003) (7 to 1 and 11 to 1 ratio of punitive

---

[2] *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed Cir. 2002).

damages awards to actual damages awards[3]); *National Union Fire Ins. Co. v. Textron Financial Corp.*, 2003 WL 1903724 (U.S. April 21, 2003) (10 to 1 ratio of punitive damages to actual damages[4]); *Anchor Hocking, Inc. v. Waddill*, 2003 WL 1903723 (U.S. April 21, 2003) (10 to 1 ratio of punitive damages to actual damages[5]); *San Paolo U.S. Holding Co., Inc. v. Simon*, 2003 WL 1903720 (U.S. April 21, 2003) (340 to 1 ratio of punitive damages to actual damages[6]). In only one of the cases where this Court granted certiorari since *Campbell* did the punitive-to-actual damages ratio exceed the 25 to 1 ratio in this case. Given that a 25 to 1 ratio is necessarily suspect in the wake of *Campbell*, this Court should similarly grant the Petition in this case, vacate the judgment, and remand the case for consideration in light of *Campbell*.

C. The Petition Should be Granted Because the Texas Court of Appeals did not Conduct a *De Novo* Review of the Punitive Damages Award.

The Petition should also be granted because the Texas Court of Appeals gave excessive deference to the trial court's determination and did not clearly apply the *de novo* standard to its review of the punitive damages award. The Texas Court of Appeals stated that for an award to violate the due process clause, it "must be so unreasonable and

---

[3] *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106, 1107 (Or. App. 2001).

[4] *Textron Financial Corp. v. National Union Fire Ins. Co.*, 2002 WL 1399105, *1 (Cal. App. 2002).

[5] *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092 (Ore. App. 2001).

[6] *Simon v. San Paolo U.S. Holding Co., Inc.*, 2001 WL 1380836, *1 (Cal. App. 2001).

disproportionate that an appellate court can justly disregard the jury's verdict and conclude that the award is grossly excessive." (App. A59.) This analysis is not consistent with this Court's directive in *Campbell* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), that appellate courts must conduct a *de novo* review of the trial court's application of the *Gore* standards to ensure that a punitive damages award "is based upon 'an application of law, rather than a decisionmaker's caprice'." *Campbell*, 123 S. Ct. 1513, *quoting Cooper Indus.*, 532 U.S. at 436. The Petition should be granted so that the proper standard of review may be applied.

D. The Petition Should be Granted Because the Texas Court of Appeals Impermissibly Considered Cass's Financial Condition in Reviewing the Punitive Damages Award.

The Texas Court of Appeals also improperly considered Cass's financial condition in addressing whether the punitive damages award was excessive. Respondents assert that the punitive damages awarded against Cass were justified by his financial condition and, in particular, by proceeds Cass "presumably" received from the sale of other oil wells. (Opposition at 20 and n. 22.)[7] The Texas Court of Appeals, in analyzing the claim that the punitive damages were excessive, specifically referenced Cass's financial condition. (App. A57.) No authority is cited for the proposition that such information, or any other information about Cass's financial condition, has any relevance when

---

[7]Respondents' claim that Cass sold the wells in question for $12 million is completely unsupported by any competent evidence in the record. The only competent evidence at trial showed that the sale resulted in little or no net proceeds to Cass.

determining whether a punitive damages award violates the due process clause. Indeed, this Court has recently made it plain that "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 123 S. Ct. 1513, *citing Gore*, 517 U.S. at 585. Respondents' continuing reliance on Cass's financial condition, and the Texas Court of Appeals' references to that information, support granting the Petition, vacating the judgment, and remanding the case.

E. The Petition Should be Granted to Address Whether, After *Campbell*, a Jury May Consider Alleged Misconduct by a Defendant Unrelated to the Subject Matter of the Plaintiff's Claims in Assessing Damages.

The Petition should also be granted to address what misconduct a jury may consider in making its award of punitive damages. It appears from the record that the jury was heavily influenced by the $978,492.10 in sanctions imposed by the trial court against Cass for alleged misconduct during the litigation. (App. A11.) This sanctions award was based on a finding that Cass committed discovery abuse by throwing away relevant documents after the filing of the lawsuit. (App. A11.) Respondents do not dispute the fact that the jury was made aware of this alleged misconduct, but claims that no dissimilar conduct was considered by the jury. (Opposition at 22.) This Court has established that "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 123 S. Ct. 1513. In *Campbell*, the Court held that the Utah Supreme Court's reliance on hypothetical claims by other parties was improper. Here, to the extent that the jury based its punitive damages award on other conduct by Cass, such as

the alleged post-litigation destruction of documents, that is also conduct independent from the acts on which liability was premised and cannot be a basis for the punitive damages award.

POINT II THE PETITION SHOULD BE GRANTED BECAUSE CASS HAS STANDING TO RAISE THE JUSTICIABLE ISSUE OF WHETHER RULES PROHIBITING CITATION OF APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS.

The Court should also grant the Petition to address the constitutional issues raised by the Texas no-publication rules. Respondents do not address the merits of Cass's claim or the importance of this issue. *See, e.g. Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.2d 1054 (8th Cir. 2000) (en banc). Instead, Respondents wrongly assert that the issue is not justiciable and that Cass cannot raise it.

Cass did raise the issue in a timely fashion. Respondents claim that the publication issue could only be raised if Cass asked that the opinion be published, asserting that Cass never did so. (Opposition at 23.) Cass asked the Texas Court of Appeals to publish the decision in his Motion for Rehearing, which was denied. (Reply App. RA 1-2.) The issue has therefore been preserved for review.

The issue has not been rendered moot by the January 2003 amendments to the Texas Rules of Appellate Procedure. Tex. R. App. P. 47.7 (effective January 1, 2003). Cass's interests, and his ability to seek review, were affected by the rules then in effect, and that impact was not cured by the amendment to the rules.

Cass also has standing to raise the issue. Respondents claim that Cass has no personal stake or real interest in the outcome and is not the proper person to raise the issue. (Opposition at 25.) No authority is cited for the proposition that Cass could only raise the no-citation issue if he was prevented from citing a helpful case by the rules. In reality, Cass has been adversely affected by the because the no-publication rules allowed the Texas Court of Appeals to disregard its own precedents without fear that its opinion would have any likelihood of being reviewed by the Texas Supreme Court. An unpublished decisions could not be important to the state's jurisprudence, thereby precluding review under Texas law. Tex. Gov't Code § 22.001(a). Because no-citation rules prohibited Cass from invoking prior unpublished decisions and adversely affected his access to further appellate review, the Court should grant the Petition and determine whether such rules violate litigants' due-process rights.

CONCLUSION

Petitioner asks this Court to Grant the Petition, vacate the judgment, and remand the case to the Texas Court of Appeals.

Respectfully submitted,

ACKELS & ACKELS, L.L.P.
HENRY J. ACKELS
LAWRENCE E. ACKELS, JR.
GREGORY K. ACKELS
2777 Stemmons Freeway, Suite 879
Dallas, TX 75207
(214) 267-8600
(214) 267-8605 (Fax)

Attorneys for Petitioner Frank Cass

. . EXCERPT FROM MOTION FOR REHEARING FILED FEBRUARY 9, 2001 IN CASS v. STEPHENS, No. 08-97-00582-CV, IN THE COURT OF APPEALS OF TEXAS, EL PASO

. . .

Whether or not the Court grants rehearing, Frank Cass requests that, pursuant to Texas Rule of Appellate Procedure 47.3(c), the Court order its opinion to be published. Texas Rule of Appellate Procedure 47.4 provides that an opinion should be published, if, inter alia, it establishes or modifies a rule of law, or involves a legal issue of continuing public interest. In its opinion, the Court:

- Changed the law of alter ego by expanding the definition of personal benefit to include the inference of benefits to family and/or friends

- Created a new standard for applying the discovery rule and the fraudulent concealment doctrine, whereby a court may later determine that a plaintiff need not exercise due diligence to uncover causes of action if, based on subsequent conduct and without any contemporaneous evidence, a jury could infer such actions would have been futile.

- Applied the discovery rule to conversion claims discovered with a simple audit.

- For the first time allowed a JOA operator to be held liable in tort for operations

- Allowed areas of double recovery, including damages based on expert testimony beyond the expert's admitted field of expertise.

The Court's opinion constitutes a significant contribution to Texas jurisprudence, particularly in the field of oil and gas law. In addition, failure to publish the opinion arguably deprives Frank Cass of his due process and equal protection rights. The Court's unpublished decision means, in essence, that Frank Cass was held liable for a multitude of damages for which no operator has ever been liable or will ever again be liable.

CONCLUSION AND PRAYER

For the foregoing reasons, Frank Cass respectfully asks this Court to grant the motion for rehearing, withdraw its opinion, reverse and remand for a new trial, or in the alternative order that the Court's opinion be published, and grant Frank Cass such other and further relief to which he may be justly entitled.

RESPECTFULLY SUBMITTED,

Gregory K. Ackels
Texas State Bar No. 00829945
Ackels & Ackels, L.L.P
2777 Stemmons Freeway, Suite 879
Dallas, Texas 75207
Telephone (214) 267-8600
Facsimile (214) 267-8605

ATTORNEY FOR APPELLANT FRANK CASS

Supreme Court, U.S.
FILED
MAY 13 2003
OFFICE OF THE CLERK

No. 02-983

In the
Supreme Court of the United States

FRANK CASS,

Petitioner,

v.

PATRICIA LOVE STEPHENS, INDIVIDUALLY AND AS TRUSTEE OF THE WALTER H. STEPHENS TRUST, THE SSH TRUST, THE SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and THE HEATHER LOVE STEPHENS IRREVOCABLE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS SUPREME COURT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TURNER, DAVIS & GERALD
John A. "Jad" Davis (Counsel of Record)
Brandy R. Manning
Attorneys for Respondents, Patricia Love Stephens, et al.
400 W. Illinois, Suite 1400
Midland, TX 79701
(432) 687-0011

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

A. *Campbell* did not outlaw the "eyebrow" test. 1

B. *Campbell* did not alter the standard of review applicable to punitive damages awards. 4

C. *Campbell* did not make it impermissible to consider Cass's wealth. 5

D. The Court of Appeals did not consider out-of-state or dissimilar conduct. 8

CONCLUSION & PRAYER FOR RELIEF 9

TABLE OF AUTHORITIES

FEDERAL CASES

BMW v. Gore,
517 U.S. 599 (1996) 2, 5, 7

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 4

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 7

State Farm Mutual Life Ins. Co. v. Campbell,
123 S.Ct.1513 (2003) 1, 2, 4-7, 9

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 2-7

STATE CASES

Cass v. Stephens,
2001 WL 28092 (Tex. App.— El Paso 2001,
pet. denied) 2-7

FEDERAL RULES

SUP. CT. R. 14(1)(A) 4

INTRODUCTION

This supplemental brief is necessary to respond to Petitioner Cass's arguments regarding *State Farm Mutual Life Ins. Co. v. Campbell*, 123 S.Ct.1513 (2003) which was decided by this Court after Petitioner's brief was filed. Although Respondent Mrs. Stephens discussed this case briefly in her Brief in Opposition to the Petition for Writ of Certiorari, Mrs. Stephens has not had the opportunity to respond to Cass's arguments. This brief is limited to responding to Cass's arguments with respect to *Campbell*.

ARGUMENT

Cass argues that *Campbell* impacts this case, and that it should be remanded so that the Court of Appeals can reevaluate the punitive damages award in light of this Court's most recent pronouncements in *Campbell*. But *Campbell* introduces nothing that would change the lower court's review in this case. For this reason, this Court should end Mrs. Stephens' seventeen-year struggle to obtain justice in this case and deny Cass's petition.

A. *Campbell* did not outlaw the "eyebrow" test.

Cass notes that the Texas Court of Appeals applied the "eyebrow" test to the punitive damages award in this case.[1] (Reply at 4). The Court of Appeals, recognizing this Court's hesitancy to impose a bright-line, formulaic rule regarding the

---

[1]Cass claims that Stephens attempted to "mislead" this Court by asserting that the ratio of punitive damages to actual damages is 6 to 1. (Reply at 3.) Because the breach of contract damages were significant, at first glance it appears that the ratio is much smaller than 25 to 1. Providing both ratios was an attempt to explain, not mislead.

ratio of punitive damages to actual damages, cited the "eyebrow test" applied in *BMW v. Gore*, 517 U.S. 599 (1996) —"[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow." *Cass*, 2001 WL 28092, *32 (Tex. App.— El Paso 2001, pet. denied). Noting that "evidently, we will know [a grossly excessive award] when we see it," the Court of Appeals was not "shocked" by the punitive damages award in this case. *Id.*

Cass misunderstands *Campbell*. This Court did not introduce a bright-line rule; in fact, it expressly "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 123 S. Ct. at 1524. In accordance with earlier punitive damages jurisprudence, this Court reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* The Court stated that "our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. This is hardly an unequivocal statement that *all* awards with greater than single digit ratios are impermissible, as Cass seems to imply.

In fact, this Court has upheld a punitive damages award greatly exceeding a single digit multiplier of actual damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) this Court upheld a punitive damages award 526 times the actual damages awarded. Thus, if *Campbell* really set a bright-line rule prohibiting ratios greater than 9 to 1, *Campbell* effectively overruled *TXO*. And there is no indication that this Court intended to overrule *TXO*; in fact, it was repeatedly cited with approval in *Campbell*.

The key to the large ratio in *TXO* is the character of petitioner's conduct. Justice Stevens, writing for the plurality, stated:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

TXO, 509 U.S. at 462 (plurality opinion). Furthermore, Justice Kennedy concurred based on the fact that TXO acted with malice. *Id.* at 468 (J. Kennedy, concurruing). He noted that the case was not one concerning negligence, strict liability, or *respondeat superior*, but one where senior officers of the company committed intentional torts. *Id.*

The facts in this case demonstrate the same disregard for the rights of others and for the law as this Court found so distasteful in *TXO*. Cass intentionally and continually cheated an vulnerable widow who considered him a friend and placed her personal trust in him. Contrary to Cass's statement that the Texas Court of Appeals did not take into account whether Cass's conduct was "so reprehensible that it justified a departure from the norm," the court wrote a 35 page, 19,000 word opinion detailing the evidence supporting the punitive damages award. *See Cass*, 2001 WL 28092 (Tex. App.—El Paso 2001, pet.

denied). The Court of Appeals, in its evaluation of the punitive damages award in this case, echoed the plurality's sentiments in *TXO*:

> [Cass] intentionally and deliberately defrauded and converted the property of [Mrs. Stephens'] for [his] own personal benefit. Fraud and conversion are ancient wrongs which are roundly denounced and receive little public sympathy. Here, the facts are egregious and show a deliberate attempt by [Cass] to escape responsibility for [his] wrongful conduct.

Cass, 2001 WL 28092 at *32. Considering the reprehensibility of the conduct and the ratios together, the Court concluded that the punitive award in this case was not unreasonable. *Id.* Considering Cass's conduct in light of *TXO*, this case is one of the "few" acknowledged by this Court in *Campbell*. For this reason, the petition should be denied.

B. *Campbell* did not alter the standard of review applicable to punitive damages awards.

Cass argues that the petition should be granted because the Texas Court of Appeals did not conduct a *de novo* review of the punitive damages award. (Reply at 6). Cass acknowledges, however, that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) stated that appellate courts should conduct a *de novo* review; such a requirement is not new to *Campbell*. Thus, this point could have been raised in Cass's petition. Since it was not, it should not be considered by this Court. SUP. CT. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Furthermore, the Texas Court of Appeals did apply a heightened standard of review. Though it never used the words "*de novo*," it stated that "despite our analysis, *BMW* evidently requires a more stringent judicial review of the jury's verdict upon a contention that the ratio of exemplary to actual damages exceeds a constitutionally acceptable range." *Cass*, 2001 WL 28092 at *32. Thus, even though it had detailed Cass's wrongful conduct over the previous 30 pages, it again considered the facts and the award in light of this Court's punitive damages jurisprudence. *Id.* It applied the *Gore* factors and concluded that on the record in this case, the punitive damages award passed constitutional muster. *Id.* at 32-33.

C. *Campbell* did not make it impermissible to consider Cass's wealth.

Campbell does not make it impermissible to consider the financial condition of a defendant. Cass quotes from *Campbell*: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (Reply at 8 (quoting *Campbell*, 123 S.Ct. at 1525)). However, *Campbell* continues: "Wealth provides an open-ended basis for inflating awards when the defendant is wealthy . . . . *That does not make its use unlawful or inappropriate*; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Campbell*, 123 S. Ct. at 1525 (quoting Justice Breyer's concurrence in *Gore*, 517 U.S. at 591) (emphasis supplied). Furthermore, in *TXO*, this Court noted that evidence of the defendant's net worth is typically considered in assessing punitive damages and that Alabama's punitive damages factors, which it had previously cited with approval in *Haslip*, included the "financial position" of the defendant. *TXO*, 509 U.S. at 462. In *TXO*, the petitioner's

wealth was explicitly taken into account in determining whether the punitives award was "grossly excessive." *Id.* Again, *Campbell* indicates no intention to overrule *TXO* in any way.

Not only is consideration of the defendant's financial position permitted, it might be required. For a punitive damages award to be effective punishment and at the same time, not be grossly excessive, the defendant's financial position must be considered. Clearly, an award that punishes and deters an individual of modest means might mean little to a multi-million dollar corporation. Similarly, what might be reasonable for a national corporation could be grossly unreasonable for an average individual. While this Court stated that the defendant's wealth could not save an otherwise unconstitutional award, it is not impermissible, and is probably advisable, to consider the defendant's financial position in reviewing a punitive damages award.

Furthermore, Cass argued in the Court of Appeals that the jury impermissibly *disregarded* relevant evidence regarding his financial ability. *Cass*, 2001 WL 28092 at *31; Appellant Frank W. Cass's Brief at p. 33 ("relevant evidence, such as Mr. Cass's net worth . . . was disregarded by the jury."). Cass testified that he had a negative net worth after the compensatory damages award; he argued that the jury disregarded his testimony. *Id.* In this Court, however, he argues that evidence of his wealth should have been disregarded.

The Court of Appeals discussed Cass's testimony regarding his wealth and his argument that the jury impermissibly disregarded it. *Id.* It first noted that the jury did not find Cass to be a very credible witness—it resolved almost every issue of disputed fact against him. *Id.* The Court of Appeals then listed some of the evidence supporting the

allegation that he was a man of means—it noted that Cass ran a company which handled over $30 million in business, that he owned interests in a number of affiliated companies, that he was a joint owner of a Lear jet, that he acted as a surety on a number of loans for his children, and that the companion wells (developed through his illicit conduct against Mrs. Stephens) were sold for $12 million. *Id.* Cass is really arguing that the jury should have disregarded what he considers unfavorable evidence and accepted his version of the facts.

Furthermore, this is not a case such as *Campbell* where there is a real danger that the jury might be prejudiced against a huge corporation without a local presence; this was the Court's concern in *Campbell* as well as in *Gore*. *Campbell*, 123 S.Ct. at 1525 (*citing Gore*, 517 U.S. at 585). The defendant in this case was an independent businessman with local ties. Under these circumstances, it is less likely that a jury will inflate an award based primarily on the wealth of the defendant.

Cass may be arguing not that his wealth was improperly considered, but that this Court should not take into account the wealth garnered by the sale of the companion wells, which were financed and developed in large part by the money and equipment Cass stole from Mrs. Stephens. But this Court has cited with approval the Alabama punitive damages statute; one of the factors it prescribes is "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22. Similarly, in *TXO*, the potential gain to the defendant had its elaborate scheme succeeded was considered. *TXO*, 509 U.S. at 461. Cass

sold the companion wells for $12,000,000.[2] The fact that the punitive damages awarded against him was less than half of the funds received by the sale of the wells further supports the reasonableness of the punitive damages award. This fact makes this case unique.

D. The Court of Appeals did not consider out-of-state or dissimilar conduct.

Again, *Campbell* did nothing new in terms of stating what conduct may not be considered—this Court has made it clear that out-of-state or dissimilar conduct may not be considered. Thus, *Campbell* would not later the Court of Appeals' analysis on that basis.

The Court of Appeals considered neither out-of-state conduct nor dissimilar conduct—there was ample evidence of Cass's wrongful conduct against Mrs. Stephens to support the punitive damages award.[3]

---

[2]Cass states that the fact that the wells in question were sold for $12 million is "completely unsupported by any competent evidence in the record." But Mrs. Stephens' expert testified that Cass and his sons sold the companion wells to Parker & Parsley for $12,000,000. XXIII:97:9016. Furthermore, the Court of Appeals also considered the $12,000,000 sale in its opinion. *See Cass*, 2001 WL 28092 at *28, *31. Cass also claims that the only "competent" evidence at trial showed that Cass received little or no net proceeds from the sale. Interestingly, he does not cite to the record to support this statement.

[3]Cass claims that the jury was "heavily influenced by the $978,492.10 in sanctions imposed by the trial court against Cass for alleged misconduct during the litigation." (Reply at 8). But the relief awarded for Cass's discovery abuse was never before the jury—the trial court vacated the sanctions award before trial and revisited the

What *Campbell* expressly denounced was the use of punitive damages awards to "expose and punish" a nationwide pattern of conduct. That was the key to *Campbell*:

> This case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. . . . The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. . . . This was, as well, an explicit rationale of the trial court's decision in approving the award . . . .

Campbell at 9.

There is no allegation that the punitive award here was used as a platform for anything. They jury simply exercised their option to punish Cass for his egregious conduct against Mrs. Stephens. The award was based on Cass's fraudulent conduct against Mrs. Stephens and nothing else.

CONCLUSION & PRAYER FOR RELIEF

For seventeen years, Mrs. Stephens has fought to bring Cass to justice. She made it through eleven years of pretrial proceedings, including multiple mandamus actions, interlocutory

---

issue in a post-trial hearing.

Mrs. Stephens' argument regarding dissimilar conduct was more fully addressed in Mrs. Stephens' Brief in Opposition at p. 18, FN 21. In the interest of limiting this brief to Cass's arguments regarding *Campbell*, it will not be reurged here.

appeals, weeks of discovery hearings, a six-week sanctions hearing, a two-week hearing on a motion to exclude or suppress evidence, numerous pretrial motions including a motion to disqualify plaintiffs' counsel, a motion to disqualify plaintiffs' expert, and eight motions for summary judgment. (Brief in Opposition at pp. 1-2 and accompanying footnotes). Mrs. Stephens was sued three times, and her attorneys, investigators, and experts were also sued. *Id.* at p. 3. But Mrs. Stephens did not give up. Twelve jurors sat through a month-long trial and when it was over, they did two things. They awarded compensatory damages, affirming Mrs. Stephens' contention that she had been taken advantage of by Cass. They also awarded punitive damages for the purpose for which they were intended—to punish Cass for his reprehensible conduct and deter similar conduct in the future. Then, the verdict withstood vigorous appellate review in what has become one of the most conservative appellate judiciaries.

But Cass refuses to accept that he's been caught and punished. He comes before this Court, not arguing that he was wrongly punished, but that his conduct was not quite as reprehensible as the jury thought it was. He asks this Court to send Mrs. Stephens back into the Texas state court system for another four or five years after having fought for seventeen years to end the dispute between them. To remand this case and send Mrs. Stephens back into the Texas court system would be a travesty of justice.

If this Court chooses to grant Cass's petition, then Mrs. Stephens urges this Court to affirm the Court of Appeals' decision. This case really is different—the facts of this case, including Cass's sale of the companion wells for more than twice the amount of the punitive damages awarded against him, make it instructive for lower courts. This case might be the

exception to the rule, but an affirmance in this case would provide guidance to lower courts trying to grasp what the rule really is.

For these reasons, Mrs. Stephens prays that this Court deny Cass's petition for writ of certiorari and for such other relief at law or in equity to which Mrs. Stephens may be justly entitled.

Respectfully submitted,

TURNER, DAVIS & GREALD
A Professional Corporation
400 W. Illinois, Suite 1400
P. O. Box 2796
Midland, Texas 79702
(915) 687-0011
FAX (915) 687-1735

By: Jad Davis (w/permission)
John A. "Jad" Davis
State Bar No. 05511400
Brandy R. Manning
State Bar No. 24029703

ATTORNEYS FOR RESPONDENTS